

Bullington
Lambert St
Emmerson
Parsons Law:

Or, A View of
ADVOWSONS.

WHEREIN
Is contained the Rights of the Patrons,
Ordinaries and Incumbents, to Advowsons of
Churches, and Benefices with Cure of Souls,
and other Spiritual Promotions.

Collected out of the whole Body of the Com-
mon-Law, and some Late REPORTS.

By *William Hughes* of *Graves-Inne*, Esquire.

Whereunto is added an
APPENDIX
CONTAINING

The Heads of the several STATUTES made
in the Reigns of King CHARLES the First,
and King CHARLES the Second, touching the
same Points; which was never before Printed.

LONDON,

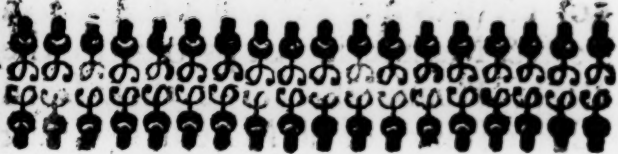
Printed by John Streater, Henry Cluiford, and Elizabeth
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Cum Gratia & Privilegio Regie Majestatis.

KD
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Law

14 Dec: 29 - 21



*To all the Reverend
Clergy of the King-
dom of England.*

Reverend Sirs,

THIS Little Treatise (called
*Parsons Law, or A View of Ad-
vowsons*) A Compendium of
the Rights, Titles, and Inter-
ests of Patrons, Ordinaries and In-
cumbents to Ecclesiastical Dignities,
Spiritual Promotions, Churches, and
Benefices with Cure, was first writ-
ten by me, at the earnest request of
some Eminent men of the Clergy, in
An. Dom. 1634. to whom I delive-
red several Manuscript Copies there-
of, (as also to many other Honoura-
ble and Worthy Persons) for their
private use. In *An. 1636.* the Tenth
year of the Reign of the late King

A 2

Charles

699956

The Epistle Dedicatory.

Charles the First over *England, &c.*
(of blessed memory,) I delivered a
perfect Manuscript Copy of it to the
Right Honourable, the then Lord
Chief Justice of his Majesties Court
of Kings-Bench, to overview it, and
have his Approbation of it; who
(finding it so much to concern the
Church and Church-men in their
Temporals,) recommended it to the
Right Reverend Father in God, *Wil-*
liam then Lord Archbishop of *Can-*
terbury; who likewise perused it, and
Transmitted it to some Learned Doc-
tors of the Canon and Civil Laws, to
consider whether there was any thing
in that Manuscript, which might be
prejudicial to the Church: Those
Doctors kept it some time in their
hands, but at length returned it to the
said Archbishop of *Canterbury* his
Grace, together with their significati-
on, That what was written in that
Treatise, was for the Benefit and Ad-
vantage of the whole Clergy in gene-
ral, and no ways against the Laws or
Liberties of the Church: Whereupon
his Grace returned it to the said Lord
Chief Justice; And his said Lordship
there-

The Epistle Dedicatory.

thereupon, not only gave his Licence, but laid his Command upon me, for the Imprinting and Publishing of it for the publick good. It lay afterwards by me for some time: But in *ANNO* 1641. (at the Importunity of some Friends) it was first Imprinted for the Author; and published: And it found good Acceptance of, and from the whole Clergy.

In the time of the Long Parliament, and the late unhappy War, and differences between the said late Kings Majesty and his Parliament and People, (notwithstanding that by Power and Prevalency (without the King) the Dignities of Bishops, Deans and Chapters, and other Spiritual Promotions, and their Lands, Possessions &c. Rights, were usurped upon, and illegally taken away by an Ordinance of Parliament only; Nay, although that afterwards, *viz.* in the time of the Usurped Powers over the people of this Nation, it was endeavoured to take away the whole Maintenance and Livelyhood of the Ministry, by the abolishing of Tythes, the chiefest

The Epistle Dedicatory,

part of their Subsistence: Yet (in the height of all these Illegal Transactions) this Little Treatise stood still on foot; was not called in, or forbidden, or so much as opposed, or ever questioned, it having received such a Worthy and Legal Approbation as aforesaid.

Since the most happy and rightfull Restoration of his most Excellent the Kings Majesty that now is, to his Imperial Crown and Dignity over the Kingdom of *England*, and his other Dominions: as also of the restoring Bishops, Deans and Chapters, and other Spirituall persons to their Prime, Original, and Legal Spiritual Livings, Dignities, Promotions and Incumbencies, and to their Rights and Interests of, in, and to the same, I have been again requested by some Reverend Divines, to review my first Work, and to add what I should think fit and requisite for the further Illustration and Confirmation of their former Rights and Interests; which I have done, adding here and there, (as occasion did arise) several Cases taken out of the late

The Epistle Dedicatory,

late Reports of some Reverend Judges, and other approved Authors for the same purpose. I hope I may say of this Little Treatise, (without ostentation) that it is *Magnum in parvo*; it being a Legal Comprehensive of all the Rights and Interests of the persons before mentioned: insomuch (as I humbly conceive) there is scarce any doubt or question which may hereafter arise concerning the same, or any of them, which may not receive a clear Resolution from some Cases herein, or by a Legal and just Consequence deduced from them.

The first Edition I published without any Epistle Dedicatory. I considered with my self, to whom I should offer, and present this Second Edition; I could not think of any persons, as to you the Reverend Clergy of this Kingdom, for whose sakes and uses it was first Written and undertaken: To you therefore I commend it, and commit it, not doubting of your favourable Acceptance of these my weak Endeavours therein; And hoping that it may some way tend to the lessening of Suits in Law, settling of Peace between you and o-

[*The Epistle Dedicatory*]

thers concerning your Rights and Interests in Temporals, and also redown to the publick good of the whole Nation, which is the desire of him, who is

From my Study in
Grays-Inn, Dec-
emb. 19. 1662.

Your Well wishing
Friend, ever to be
Commanded,

William Hughes.

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World.

CHAP. XXXI.

Of the Power of the Bishop, and of the
Parsons, and of the Rectors, and of the
Vicars, and of the Curates, and of the
Chaplains, and of the Clergy, and of the
Laity, and of the People, and of the
Church, and of the State, and of the
World.



Parsons Lavv,

OR, A

View of Advowsons.

CHAP. I.

Of Archbishops and Bishops, and of their Election, Confirmation, Consecration, and Investiture; And when their Temporalities shall be delivered unto them.

AN Archbishop is a Spiritual person Secular, who hath Jurisdiction in all Causes and things which are Ecclesiastical, in a Province within the Realm whereof he is the Archbishop.

In the Realm, of *England* there are but two Provinces, viz. *Canterbury* and *York*; the Archbishop of *Canterbury*

Vid. Matth. Parker, Antiquit. Brit. fo. 111.

B

bury

Ranulph. Ci-
stren. lib. 2.

cap. 57.

16. Eliz. Dy-
cr, 327.

Cook 1. part,
Institur. 94.
Matthew Par-
ker Antiquit.
Britan. 20.

bury is at this day stiled, *Metropolitanus & Primas totius Angliæ*; The Archbishop of York, is *Primas, & Metropolitanus Angliæ*.

Each of these Archbishops hath in his Province suffragan Bishops of the several Provinces; The Archbishop of Canterbury hath under him within his Province, Rochester his Principal Chaplain, London his Dean, Winchester his Chancellour, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Lichfield, Hereford, Landaffe, St. Davids, Bangor and St. Asaph, Gloucester, Bristol, Peterborough and Oxford.

The Archbishop of York hath under him, within his Province, The Bishop of the County Palatine of Chester, erected and annexed by King Henry the 8. to his Province; The Bishop of the County Palatine of Durham; The Bishop of Carlisle, and of the Isle of man annexed also to his Province by King Henry the 8.

The Archbishop of Canterbury hath the Predency of all the Clergy within the Realm of England, and is ranked before all the Nobility of the

the Realm, viz. next and immediately after the Kings Children, Brothers, &c. And in all antient Charters, Statutes, and Acts of Parliaments, the Bishops were ever named before the Temporal Lords; as appeareth by the Statutes of *Magna Charta*, and *Charta de Forreſta*; *Henricus Dei gratia*, &c. *Archiepiscopis*, *Episcopis*, *Comitibus*, *Baronibus*, &c. and by other Statutes.

All the Archbiſhopricks and Biſhopricks within the Realm of *England* were of Kings Foundations, and the Kings of *England* were the Founders of them all: At the firſt they were Donative, *per traditionem Baculi Paſtoralis*, & *annuli*; Which was a Symbol of a Spiritual Marriage betwixt them and the Church: But afterward King *John*, by his Charter 15. *Januarii*, *Anno Regni ſui* 17. *De communi conſenſu Baronum*, granted, That they ſhould be ever after *Elegible*; And after that time came in the *Conſe de Eſlier*.

In Antient time by the Common Law, the Founders and Patrons of Churches and Benefices, had a full and an absolute inheritance in them,

Vid Cook 53
part 14. in
Cawdries caſe,
Vid. Stat.
1. Jac. cap. 3.
17. E. 3. 40.

Vid. Cook. 13
part, *Inſtitut.*
342

Br. tit Pre-
sentment al
E. elise 41.
6 H. 7 14.
19. E. 3. tit.
Qu. Imp. 60.
Seldom tit.
Dism. cap. 6.
fo. 91.

and upon every vacancy might have conferred them upon Incumbents, without Admission, Institution and Induction of the Bishop by Livery, or delivering unto them the ring of the Church door: And the Investiture of Bishops (as before is said) were only *per Annulum, & Baculum*; But by General Councils, afterwards, the Right not only of Investiture, but of Institution and Induction of Incumbents of Churches were transferred to Bishops and others.

Rott. Pat. 18.
H. 3. Membr.
17.

vid. 7. H. 8.
Kellaway
184. in De.
Standishes
case.

Bishops hold their Temporal Possessions of their Bishopricks *per Baroniam*, as appeareth Ex Rott. Patent. de anno 18. Hen 3. Membr. 17. viz. *Mandatum est omnibus Episcopis qui conventuri sunt apud Gloucestriam die Sabath. in Crastin. Ste Katherine, firmiter inhibendo, Quod sicut Baronias suas, quas de Rege Tenent, diligunt, nullo modo presumant Concilium tenere de aliquibus quæ ad Coronam Regis pertinent, vel quæ personam Regis, vel statum suum, vel statum Concilii sui contingunt: Scituri pro certo, quod si defecerint, Rex inde se Capiat ad Baronias suas.* And they sit in Parliaments as Barons, by reason of their Temporal possessions.
The

Chap. I. *Parsons Law.*

The Diocess of every Archbishop and Bishop, is divided into Archdeaconries, according to the extent of the Bishoprick: Whereof some are by Prescription, as the Archdeaconry of *Richmond* is; Some are *de jure* by the Law, and some are by Covenant and Contract made between the Bishop and the Archdeacon. When the Archdeacon hath his Jurisdiction by Covenant, or Contract, the same doth not take away the Jurisdiction of the Bishop; as the same doth, where the Archdeaconry is holden by Prescription, or *de jure*: For if the Bishop doth hold plea, or doth intermeddle with any thing within the Jurisdiction of the Archdeaconry by Covenant or Contract, the Archdeacon can only have an Action of Covenant against the Bishop: But if the Bishop doth intermeddle within the Archdeaconry, where the Archdeaconry is by Prescription, or *de jure*, in such case the Archdeacon may have a Prohibition against the Bishop. All which hath lately been adjudged in the Court of Kings Bench, *Trinity*. 21. *Jac.* in *Castrell* and *Jon s* Case.

17. E. 3. 43.
Coo. 5. part,
in *Cawdries*
Case.

8. H. 6. 3. by
Chauntrell,

Cco. 1. part,
Institut. 94.

The Archdeacon is *Oculus Episcopi*. And there are 60. Dignities of Archdeaconaries within the Realm of *England*; and these are divided into Deaneries, and Deaneries into Parishes, Towns and Hamlets.

To the Creation of every Archbishop and Bishop, there are necessarily required three things. 1. Election. 2. Confirmation. 3. Consecration and Investiture: The Election is as the Solicitation, the Confirmation is as the Contract, the Consecration is the Consummation of the Spiritual Marriage; The Restitution of the Temporalities, is as it were the bringing home of the wife.

1. Election is made after this manner, *viz.* A Licence under the Great Seal of *England* is granted to the Dean and Chapter of the Cathedral Church, when the See of such Archbishop or Bishop is void, to proceed to the Election of a new Archbishop or Bishop, with a Letter Missive, containing the person whom they shall Elect or Choose to the said Archbishoprick or Bishoprick being void: This Election must be within twelve dayes after the Licence and

Vid. 3. Car.
in Evans and
Ascoughs
Case. Latch.
Reports, 245

Vid. The Statute of 25.
H. 8. cap. 20.

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Chap. i.

Parsons Law.

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and Letters Missive are delived unto them. (if the Dean and Chapter, after the Letters Missive delivered do refuse or neglect to make the Election, they run into danger of a *premunire*.) And if the Dean and Chapter defer their Election above twelve dayes after they have received the License, and the Letters Missive; Then and in such case, the King doth use by his Letters Patents under the Great Seal of *England*, to nominate or present the person to the Office and Dignity of a Bishop being void; And such Nomination or Presentment, if it be to the Office and Dignity of a Bishop, is usually to the Archbishop or Metropolitane of the Province where the See of the Bishop is void: But if such Nomination or Presentment be made by the Kings Majestie, for default of Election of the Dean and Chapter unto the Office and Dignity of an Archbishop; Then the King by his Letters Patents under the Great Seal, doth Nominate or Present such Person as he shall think good to have the Dignity, unto one Archbishop and two other Bishops, or else to four such

B 4

Bishops

*Vid. Stat. 25.
H. 8. cap. 20.
sect. 3 Rastall.
Vid. Cook.
12. part. Re-
ports 59. ac.*

Bishops of the Realm as shall be assigned by his Majesty: But if the Dean and Chapter, do after the Licence and Letters Missive, elect the person nominated in the Letters Missive, according to the Kings Pleasure therein; Then is the Election well made; And upon Certificate made of such Election unto the Kings Majesty under their common Seal, the person elected is reputed and called Lord Bishop Elect.

By this Election he is not absolute Bishop to all purposes; He is a Bishop *Nomine* only, *non re*; *Non habet Potestatem jurisdictionis neque Ordinis*. He is but as *Embryon in ventre*, till his Confirmation and Consecration: For if a man be but elected a Bishop, if there be cause to bring a Writ of Right in the Court of a Mannor which doth belong to his Bishoprick, the Writ shall not be directed *Episcopo*, but *Balivis* of the Bishop Elect. Neither doth Election of any person to any such Arch-bishoprick or Bishoprick, if he was before Parson or Vicar of any Church Presentative, or Dean of any Cathedral, or held any other Episcopal Dignity, make the first

Mich. 22. Jac.
Litch. Re-
ports, 246.
38. E. 3 31.

F.N.B. 1.

first Benefice, Deanery, or Dignity to be *ipso facto* void in Law; For that it hath been adjudged, that a *Commendam retinere* made to such a person of such Personage, Deanery, or other Dignity which the said Person had before he was Elected Bishop, comes time enough in Trin. Term. 11. Jacob. in the Common pleas in *Colt* and the Bishop of *Conventry* and *Litchfields* Case: and in Pasch. 3. Car. 1. in the Kings Bench in *Evans* and *Ascoughs* Case, which Case see now at large reported.

Vide *Colt* and the Bishop of *Conventry* and *Litchfields* case in *Hoberts* Reports. Tr. 30. Car. *Evans* and *Ascoughs* case *Latch.* 237.

If an Abbot pendant a Writ brought against him be made and Created Bishop, the Writ shall not abate, because the Creation of him a Bishop is not his own act, but the act of another, *viz.* of the King. And Election only of one to a Bishoprick, who had before a Benefice of Cure, or any other Ecclesiastical Dignity or Promotion, doth not make a Cessation of it; for if it should, it should be to the prejudice of the party.

V.9.H.5 13.

20. E 3 *Fitz.* tit. *Brief.* 25.

The second thing incident to the Creation of an Archbishop, or Bishop, is, Confirmation, Consecration

on and Investure. This was antiently done by Bulls and Breves from the Bishop of *Rome*, who claimed a Spiritual Jurisdiction in this Realm. But now, since the Statute of 25. H. 8. cap. 20. the same is done by the Archbishop, or Metropolitan of the Province in which such Bishoprick is void, with such Benedictions and other Ceremonies as are requisite: but it is to be noted, That before the Archbishop, or other Bishop is Confirmed, Consecrated, or Invested, He must take an Oath of Fealty unto the Kings Majesty only, and then, after such Oath taken, and Fealty done only to the Kings Majesty, the King doth under his great Seal signifie his Election to one Archbishop, and two other Bishops, or else unto four Bishops within his Majesties Dominions, thereby commanding them to confirm his Election, and to Consecrate and invest the person; and to use such Benedictions, and other Ceremonies as are requisite thereunto.

25. Stat. 25.
H. 8. cap. 20.

25. Stat. 25.
H. 8. cap. 20.

25. Stat. 25.
H. 8. cap. 20.

As for his Confirmation and Consecration he is compleat Bishop to all

all purposes, as well to Temporalities as to Spiritualities. And then he hath *plenam protestatem Jurisdictionis, & Ordinis*: And therefore after he is Consecrated he may certifie an Excommungement: When he is Confirmed, the power of the Guardian of the Spiritualities doth cease. *18. Eliz. Dyer. 350.* and *vid. 22. E. 3. 13.* Where a Writ awarded *Episcopo Eleto & Confirmato*, to admit a Clerk to a Benefice, was holden good.

When he is Consecrated, he may Confer Orders upon others, and may Consecrate Churches, or Chapels, which he could not do before his Consecration: For although by his Confirmation, *Conjugiam contrahitur Spirituale*, (as before is said) yet by Consecration, *Consumitur*.

After that he is confirmed, and before he is Consecrated Bishop, the King may by his Letters Patents grant unto him his Temporalities, and such Grant shall be good: But such a Grant from his Majesty is *potius de gratia quam de jure*. But after that he is Consecrated, Invested and installed in his Bishoprick, he

he is fully enabled for to sue for his
7. F.N.B. acc. Temporalties out of the Kings hand
 by a Writ *de restitutione Temporalium*
 directed to the Escheator; and
 so he shall enjoy the Actual posses-
 sion of them: But yet the Temporal-
 ties are not *de jure* to be delivered
 unto him untill the Metropolitan hath
 certified the time of his Consecrati-
 on, although the Freehold of the
38. E. 3. 30. Temporalties be in him by his very
 Consecration, as the Book in 38. E.
 3. 30. is.

Tr. 3. Ca. B.R.
 in Evans and
 Ascoughs case.
Latch. 237.

21. H. 6. 3. by
Markham.

If a Bishop of one Diocess be
 translated to a Bishoprick in another
 Diocess, there needs no Confirma-
 tion, or new Consecration of him,
 for that Consecration once had its
character indelibilis; And although
 for Cause, or Crime, he may after-
 wards be deposed and removed from
 the See, or may be suspended *ab*
Officio & Beneficio, that is to say, from
 the Execution of his Spiritual Juris-
 diction, and from the Receiving
 the Temporalties and Profits of
 the Bishoprick: Yet still he re-
 tains the title of a Bishop, for that
 the Order cannot absolutely be
 taken from him, being (if not by
 Divine)

Divine) yet by Apostolical Institution.
Tamen Quere.

CHAP. II.

Of Deans and Chapters, and of their Elections: How all persons belonging to Cathedral Churches held their possessions at the first together; And how and by whom they came afterwards to be divided and severed.

EVery Archbishop and Bishop hath a Dean and Chapter consisting of Spiritual and Ecclesiastical persons. There are four sorts of Deans or Deaneries; of which, and of whom the Law of this Realm taketh knowledge. The first is a Dean who hath a Chapter consisting of Prebendaries or Cannons: For seeing, that it was impossible but that Sects, Schisms and Heresies should arise in the Church, it was in Christian policy thought fit and necessary, that the burthen of the whole Church, and the Government thereof should not lie upon the person

son of the Bishop only; and therefore it was thought necessary that every Bishop within his Diocess should be assisted with a Council.

1. To consult with them in matters of difficulty concerning Religion, and deciding of the controversies thereof.
2. For the better ordering and disposing of the things of the Church, and to give their assent to such estates as the Bishop should make of the Temporalities of his Bishoprick; For it was not thought convenient that the whole power and charge thereof, should remain in any one sole person only; *i. e.* in the Bishop; and yet was the Dean and Chapter subordinate to the Bishop.

Cook 3. pr. in
the case of the
Dean and
Chapter of
Norwich.

The Dean which hath a Chapter, such as the Dean of Canterbury, St. Pauls, &c. is set forth to be an Ecclesiastical Governour Secular over the Prebendaries and Cannons in the Cathedral Church. And the Patronage of all such Deaneries is in the Crown, and doth not belong unto any Subject. The antient Deans of Chapters come in as Bishops now do by a *Conge de Eslier*, and

and are confirmed by the Bishop: But those Deaneries which were translated from Priories and Covents, or which were founded after the Dissolution of Abbies and Monasteries by King *Henry* the eighth, or other Kings of this Realm, are now Donative, and by the Kings Letters Patents they are Installed.

Cook. 1. pt.
Institut. 97.

The Chapter are the Prebendaries or Cannons (as before is said) and is *Clericorum Congregatio sub uno Decano in Ecclesia Cathedrali*. Some Chapters are Antient, and some Later: the Later are of two sorts. 1. Those which were founded or translated by King *Henry* the eighth in the places of Abbots and Covents, or Priors and Covents which were Chapters whilest they stood: & these may be said to be new Chapters, but belonging to old Bishopricks. 2. They are said to be new Chapters, which are annexed unto new Bishopricks founded by King *Henry* the eighth: such as were *Bristol*, *Chester*, *Oxford*.

The second Dean, is a Dean who hath no Chapter; and yet he is
Pre-

Presentative, and hath cure of Souls ; Who hath a Peculiar and Court, wherein he holdeth Ecclesiastical Jurisdiction ; but he is not subject to the Visitation of the Bishop or Ordinary : Such a one is the Dean of *Battel* in *Suffex*, which Deanery was founded by King *William* the Conqueror : And the Dean there hath Cure of Souls, and hath Spiritual Jurisdiction within the Liberty of *Battell* : and he is Presentable by the Patron unto the Bishop of the Diocess, and is admitted to the Deanery by Institution and Induction by the Bishop of *Chichester*, although he be exempt from the Visitation of the same Bishop. And the Patronage of such a Deanery may be in a Subject, as the Patronage of the Deanery of *Battell* a long time hath been, and I believe yet is, and remains in the Family of the Lord Viscount *Mountacute*.

The third Dean is Ecclesiastical also ; but the Deanery is not Presentative, but Donative, nor hath he any Cure of Souls ; but he is only by Covenant or Condition, and he also hath a Court and a Peculiar,

in

in which he holdeth Plea and Jurisdiction of all such matters and things as are Ecclesiastical, and which do arise within his Peculiar, which oftentimes extends over many Parishes. Such a Dean Constituted by Commission from the Metropolitan of the Province, is the Dean of the Arches, and the Dean of *Bocking* in *Essex*; and of such Deaneries there are many more.

The fourth sort of Dean, is he who is usually nominated and called Rural Dean; He hath not any absolute Judicial power in himself, but is only to Order and Prepare the Ecclesiastical affairs within his Deanery and Precinct, by the Direction of the Bishop, or of the Archdeacon, and is a Substitute of the Bishop in many Cases; as in granting of Letters of Administration, Probate of Wills, &c. and took place first upon the Division of Parishes: For (as I said before) The Diocess of every Bishop was divided into Archdeaconries, and they into Deaneries, which were these Rural Deaneries, and these Deaneries into Parishes, Towns and Hamlets: But the

the Power and Jurisdiction of these Rural Deans is now almost lost and extinguished, the same being encroached upon, and as it were swallowed up in the Office of the Archdeacon, and the Bishops Chancellor, who now execute their power and authority throughout all the Dioceses of the Bishops of *England*, although that in other Countreys, and in some part also of this Realm of *England*, the Jurisdiction of these Rural Deans is still in full force.

11. H. 4. 9;

The Bishop, Dean and Chapter, (which were the Prebendaries or Cannons, as before is said) and all other persons belonging unto, or having any thing to do in Cathedral Churches, at the first, and in ancient times held their possessions together in gross; but afterwards for the avoiding of Confusion, and for better Order, and for some other special Causes known to the Kings and State of this Realm, the same were afterwards by them severed and divided; and part of the Lands and possessions belonging to the same Church were assigned to the Bishop and his Successors to hold by themselves, and other

other parts thereof were assigned unto the Dean and Chapter to hold by themselves; of which Lands they have ever since continued severally seized in their several Capacities. This appeareth more

plainly by the Book 17. E. 3. 29. where the Treasurer of a Cathedral Church brought an Assize of some of his possessions in his own Name, and the Defendant pleaded in Barr a Release of the Dean and Chapter, and it was ruled to be no Barr, because that the Treasurer now held his possessions severed from the possessions of the Dean and Chapter; and yet a Lease made of them by the Treasurer, without the Confirmation of the Dean and Chapter, was holden not to be good, but only during his own time, and not to bind his Successor. And also it hath been seen, That the Chapter also hath maintained Writs of their several possessions against the Dean.

For the Prior of *Westminster* brought a *Quare Impedit* for a Presentation to a Church which belonged to his Priory against the Abbot of *Westminster*, as was said by *Finchden*,

17. E. 3. 29.

17. E. 3. 64. b.

40. E. 3. 28.

20. E. 3. c.

Nonability 20

acc.

C 2

40. E. 3.

40 E. 3. 28. wherewith agreeth the Book of 20. E. 3. Fitz. title Nonability 9.

V. Cook 2. pt.
in the Bishop
of Canterburies
Case.

21 H. 7. 39.

49. E. 3. 14.

All Archbishops, Bishops, Deans, Prebendaries, Archdeacons, Parsons, Vicars, are secular persons, and are not now Religious, although they are Church-men, or Men belonging to the Church. For no persons are said in Law to be Religious, but such only as have vowed three things, viz. Obedience to the Sovereign of their House and Order; perpetual Chastity; and wilfull poverty; Or such as are professed in some Religious Order, as the Augustine and Franciscan Monks, &c. Yet may all such Ecclesiastical persons Secular hold Lands in Frankalmoigne, and Lands at this day may be given to them and their Successors to be holden in Frankalmoigne, with the Consent of the King, and of the Lords Mediate and Immediate, notwithstanding the Statute of *Mortmain*. For that *Quilibet potest renunciare juri pro se introducto*; And if they do consist of a sole Corporation or body Politick, as Bishop, Prebendary, Parson, Vicar,

Vicar, &c. a Feoffment may be made to them of Lands *in Libra Elemosina*, either by Deed or without Deed, and the Fee-simple shall pass unto them without the word (Successors.) But if any such Feoffment be made to a Corporation Aggregate of many persons, as to Dean and Chapter, &c. there to pass the Inheritance unto them, there must be the word Successors in the *Habendum* of the Deed, and the Feoffment must be by Deed, otherwise it is not good in Law.

CHAP. III.

Of the Capacities of Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars, and other Ecclesiastical persons, to Purchase, Hold, and Grant: And of Different Acts and things to be done by them, and to them.

EVery Archbishop, Bishop, Archdeacon, Dean, Prebendarie, Parson, Vicar, or other Corporation Spiritual, Sole, or Aggregate, have a double Capacity in them to Purchase,

7. E. 3. 35.
 35. E. 3. 35.
 Cook, 1. Dist.
 Institut. 8.
 Inst. 10.

chafe, Hold or Grant. If Lands be given to a sole body Politique or Corporate, as to a Bishop, Archdeacon, Prebendary, Parson, Vicar, there to give them an estate of Inheritance in his or their Politique or Corporate Capacity, there must be these words in the Grant or Deed, viz. To Have and to Hold to him and his Successors; for without the word (Successors) in such cases the Inheritance passeth not unto them, except (as before is said) in the Case of *Frankalmoigne*: But if Lands be given to a Dean and Chapter, or other Corporation Aggregate, they may have an Inheritance, or a Fee-simple in the thing passed unto them without the word (Successors) for that the said body Politique never dyeth; but then they must take the thing granted in their politique Capacity, and not in their natural Capacity. If the King by his Letters Patents, grants Lands *Decano & Capitulo, &c. Habendum sibi & heredibus, & successoribus suis*; The grant shall run to the Dean and Chapter and his Successors in their politique Capacity, and not to him and his heirs

18. H. 6. 11.

heirs in his natural Capacity.

There is a great difference in things to be done by Corporations Spiritual, which are Sole; and Corporations Spiritual which are Aggregate of many persons: 1. If a Sole Corporation, as a Bishop, Prebendary, Parson, Vicar, &c. make a Feoffment in Fee, with a Letter of Attorney for to deliver Livery and Seisin of the Lands, the Livery must be made in the life time of the Bishop, Prebendary, Parson, or Vicar, &c. But if a Dean and Chapter, or other Corporation Aggregate, make a Deed of Feoffment of Lands, with a Letter of Attorney for to make Livery and Seisin, there Livery made by the Attorney after the death of the Dean is good, and shall stand effectual in Law. 2. A Sole Corporation, as a Bishop seized in the right of his Bishoprick, shall do Homage; but a Parson or a Vicar who have but a Qualified Fee in them, shall neither do Homage nor receive Homage: Neither shall a Dean and Chapter do Homage, because they cannot do it in person; and Homage must alwayes be done in person: Neither shall a

C 4

Bishop

18. H. 8. 9.
11. H. 7. 19.
acc.

Cook 1. part
Institur. 52.

Temp. E. 1.
Fitz. Juris
utrum. 13.
8: E. 3. 28.

33. H. 8. Br.
Fealty, 18.

Cook 7. pr. 10
Cook 10 part,
31. acc.

Bishop do Escuage in person, but he shall find an able man to do the same: For it is a Rule, That *Nemo militans* Glanvil. lib. 9. *Deo implicet se secularibus negotiis.* And the old Books are, That the esp. 1. Homage which a Bishop doth, is rather Fealty then Homage: For that it wanteth the words of Homage, viz. *Jeo de veigne vostre home*, &c. Yet in the opinion of Cook chief Justice, in his first book of Institutes, 65. it is Homage, because he saith, I do you Homage. 3. A Corporation spiritual Sole, as a Parson, Prebendary, Vicar, &c. who had not the absolute Fee-simple of the Lands in them, could not have charged their Lands or Possessions, without the assent of their Patrons or Founders: But a Corporation Aggregate of many persons, as a Dean and Chapter, Master of a Colledge and Fellows, &c. who had the absolute Fee simple of the Lands in them, might have made Grants, and thereby charged their possessions, or might have discontinued their Lands or Possessions without the assent of their Founders.

19. E. 3. 7.
8. E. 2. 10.
9. E. 4. 6.
38. E. 3. 19.

Chap. IV.

Of Leases made by Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars: And where their Leases are good by the Statute of 32. H. 8. I. & 13. Eliz. and other Statutes. Where not.

EVERY Archbishop, Bishop, Archdeacon, Prebendary, Parson, Vicar, and other Corporation Spiritual, by the Common Law might have made Leases *Concurrentibus his qui in lege requiruntur*, for lives or years without limitation, or stint of time. But they are now by the Statutes of 32. H. 8. Stat. of 1. & 13. Eliz. and other Statutes, restrained to make any Leases of their Lands or Possessions belonging to the Church, but according to such limitations and under such provisos as are mentioned in the said Statutes.

Now by the Statute of 32. H. 8. which is an enabling Statute to some persons and purposes, A Bishop by his Deed, without the Dean and Chapter :

Cook 5. part,
14.
Cook 10. part;
60.
Cook 11. part,
66.

Cook 1. part
Instit. 44.

Chapter : A Parson seized in Fee in the right of his Church, may make Leases under these Cautions, Limitations, and Provisoes following, *viz.*

1. The Lease must be made in writing by Deed Indented, and not by word.
2. The Lease must begin from the day of the Date thereof, or from the making thereof.
3. The old Lease must be surrendered, expired, or ended within one year at the making of the second Lease; and such surrender must be absolute, and not conditional.
4. There must not be a double Lease in being at one time.
5. The Lease must not exceed twenty one years, or three lives from the making thereof.
6. The Lease must be of Lands or Tenements maynorable, out of which a Rent may be reserved.
7. The Lease must be of Lands or Tenements which commonly have been letten to Farm by the space of twenty years next before the Lease made.
8. There must be reserved to them and their Successors so much yearly Rent, or more, which hath been accustomably used to be paid for the said Lands or Tenements within twenty years before the Lease made.

Cook 5. pt. 6.
in the Lord
Mountjoyes
Case.

Cook 5. pt. 3.
Elmors Case.

Cook 6 pt. 37.
The Dean and
Chapter of
Worcesters
Case.

Cook 5. pt. 6.
Cook 6. part,
37. acc.

made. 9. The Statute of 32. H. 8. Cook 6. part; doth not extend to any Lease to be made without impeachment of Waste.

A Parson, Vicar, &c. if they make Leases for twenty one years, or three lives, according to the enabling Statute of 32. H. 8. they are out of the Statute, and their Leases must be confirmed by the Patron and Ordinary; But a Bishop who is seized in the right of his Bishoprick; A Dean of his Sole possessions seized *in jure Dacconatus*; An Archdeacon seized *in jure Archidiaconatus*; and a Prebendary seized *in jure Prebende*; every one of them is seized *in jure Ecclesie*, and may make Leases with the Cautions, and under the Limitations and Provisoos before mentioned, without Confirmation.

If a Bishop maketh a Lease for twenty one years, and all those years are spent or run out saving three or more; yet may the Bishop make a new Lease for twenty one years to begin from the making according to the Exception of the Statute, but not a Lease for life or lives; and such concurrent Lease hath been resolved to

to be good, as well upon the Exception of 1. Eliz. which extends to Spiritual and Ecclesiastical Corporations, which the Statute of 32. H. 8. did not do; but then in the case of concurrent Lease, in the case of a Bishop, it must be confirmed by the Dean and Chapter: For the making of this good, I shall shew you only two Presidents and Resolutions.

Marshals Case
vouched in
Wroth, and
the Countess
of *Suffex* case.
Pas. 28. Eliz.
B. R. Leonards
Reports 1. p.
131.

See *Pas.* 38. Eliz. in B. R. in *Wroth* and the Countess of *Suffex* Case, upon the Statute of 1. Eliz. where it is said it was adjudged in one *Marshals Case*: Where the Bishop of *Canterbury* made a Lease unto him for twenty one years, to begin at the end of the first Lease, was adjudged to be void. But in the great Case which was in the Exchequer Chamber upon this point, there the second Lease was in possession, and to begin presently, and to run out with the other Lease; and therefore it was adjudged to be good, because the Land was charged but with twenty one years, and no more.

Pas. 29 Eliz.
in B. R. Bun-
ney and
Weights Case.

A. Bishop of London Leased parcel of the possessions of his Bishoprick for twenty one years, and afterwards he

he put out his Lessee, and then Leased the Lands to another for three lives, rendring the antient and accustomed Rent which was confirmed by the Dean and Chapter: Afterwards *A.* was translated to another See; In this case it was Resolved by the Justices, That the Lease was warranted by the Statute of 1. Eliz. and in this case it was said, That at the Common Law, a Bishop might make an Alienation in Fee-simple, being confirmed by the Dean and Chapter: But by the Statute of 32. H. 8. Bishops without Dean and Chapter, or their Confirmation, might make Leases for twenty one years, but with their Confirmation they might make Leases for a thousand years: But now by the Statute of 1. Eliz. their power in that is much abridged, for that now with Confirmation or without Confirmation, they cannot dispose of their possessions but for twenty one years, or three lives.

Note, That all Leases not warranted by the Statute of 1. Eliz. and 13. Eliz. stand good against the Lessors themselves, and are voidable only by their Successors. But if a Parson,

Vid. Cook 3^d part, in Lincoln Colledge Case.

Pasc. 29. Eliz.
inn Co. B.
Hunt and
Singletons
Case, acc.

son, Dean, Prebendary, Vicar, make a Lease for years or for life, the same is void by his death, by the Statute of 14. Eliz. And if it be for twenty one years, or three lives, it were void by the Statute of 13. Eliz. if it be not made according to the Provisoos and Limitations above-mentioned.

CHAP. V.

Of Alienations and Discontinuances made by Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars; Where their Grants, Charges, or Leases were good at the Common Law without Confirmation; Where not; And by what Statutes they are restrained to discontinue or alien their Lands or Possessions.

Vid. Cook 5.

part, 14.

Vid. 29 Eliz.

Lenn. 1. part,

Bunney and

Wrights Case.

acc.

BY the Statutes of 1. & 13. Eliz. and 1. Jacob. Bishops and all other Ecclesiastical persons are restrained to alien or to discontinue any of their Ecclesiastical Lands or Possessions; And if they do convey and alien away any of their said Lands or Possessions.

Possessions, although that it be unto the King himself, yet the alienation is void in Law: For although that the King be not expressly named in the Act of 1. Jac. yet the said Statute being made to suppress Alienations, Discontinuances and Wrongs done by Clergy-men to their Successors, the King is included in the general words of the Statute, *viz.* the words *person or persons*.

Cook 21. pt.
in Magdalen
Colledge
Case.

If a Bishop had been Patron of a Church, the Bishop could not make any Grant by the Parson or Incumbent of the Lands of his Parsonage good, either by his Licence precedent, or by his Confirmation subsequent, without the Confirmation of the Dean and Chapter: But if there had been Parson, Patron, and Ordinary, and the Patron and Ordinary had given Licence by their Deed to the Parson to have granted a Rent charge out of the Gleab, and the Parson had made such a grant, the same should have bounden the successors of the Parson at the Common Law, before the said restraining Statutes, although it had not been confirmed afterwards, and that by reason of the

11. H. 6. 9.
31. H. 8. br.
tit. charge 40.

pre-

31. E. 3. Fitz.
tit. Grant. 61.
16. Aff. 38.
9. Eliz. Dyer
252. acc.

precedent Licence; and also in such case, the Ordinary alone might have agreed to such a Grant of a Rent charge by his Licence precedent, or Confirmation subsequent, without the Confirmation of the Dean and Chapter, because that in that case, the Confirmation or Licence of the Patron had not been good to have made the charge perpetual upon the Church, unless the Patron had had a Fee-simple in the Patronage, which if he had had, then the Grant of the Rent by the Parson *concurrentibus his*, had been good, and should have charged the Lands, and bound the Successors of the Parson at the Common Law, before the restraining Statutes.

Now; *confirmare*, or a Confirmation is but *firmum facere*, and is as it were but an assent to the Act or Deed of the Bishop, Parson, &c. and therefore although the Confirmation had not been alwayes of the estate, yet if it had been but of the Deed of the Bishop, &c. the same had been sufficient. And therefore if a Bishop before the said restraining Statutes of 1. Eliz. and 1. Jacob. had made a

Feoff-

Peoffment in Fee of Lands parcell of his Bishoprick: And the Dean and Chapter by their Deed, had confirmed the Deed of the Bishop, the same had been good. So if a Bishop by Deed enrolled, had conveyed Lands unto the King, and the Dean and Chapter had confirmed the Deed of the Bishop, and afterwards the Deed had been enrolled, it had been sufficient to have confirmed the Lands unto the King, although that the Deed of the Dean and Chapter had not been enrolled. For the assent was to be made to the Act of the Bishop, and to him, and not unto the King: But at this day (as I said before) Bishops cannot make any Conveyances, thereby to prejudice their Sees or Successors; Yet this doth not take away the Rule of Law, but that a Confirmation made of the Deed of the Bishop or Parson, at this day is sufficient, although that the estate is not confirmed which is granted by the Bishops or Parsons Deed: And therefore, if since the Statute of 13. Eliz. a Parson, Vicar, &c. make a Lease for twenty one years or three lives, and the Patron

D

and

and Ordinary do confirm the Deed of the Parson or Vicar, this shall (as I conceive) make the Lease good to some purposes, and shall be a Confirmation of the Lease it self, although the Term be not thereby confirmed.

*Vid. Cook 1.
part, Institut.
15.*

If Parson and Ordinary make a Lease for years of the Gleab Lands to the Patron, and afterwards the Patron doth assign or grant this Lease over to another Parson by his Deed, the assignment is good, and a Confirmation of the first Lease made unto himself: And the Deed of the Patron doth amount to a double intent, *viz.* both to make the Assignment of the Lease good, and to a Confirmation of that Lease to the Assignee.

*Cook 5. part,
81. Fords
case*

There is a difference betwixt a Confirmation of the Term, and a Confirmation of the Lands: And therefore if before the Statute of 13. Eliz. a Prebendary had made a Lease for seventy years of the Corps of his Prebend, and the Bishop Patron of the Prebend, and the Dean and Chapter had confirmed *dimissionem prædictam* for fifty years, & non ultra,

ultra, the Confirmation had extended to the whole Term, and the Word (for fifty years & *non ultra*) had been void. But if the Bishop and Dean and Chapter, had recited the Lease for seventy years, and had confirmed the Lands to the Lessee for fifty years, the Confirmation had been good for those fifty years only.

If a Bishop hath two Chapters, (as there may be two, or more unto one Bishoprick,) both of the Chapters must confirm Leases made by the Bishop: But if one of the Chapters after the Date, or making of the Lease be Dissolved; there a Confirmation by the Chapter which is in being, is sufficient to make the Lease good; and in such Case, there needeth not any Confirmation of the King, who is Supream Patron (as before is said) of all the Bishopricks in *England*.

If a Dean of a Cathedral Church be elected Bishop of another See, with a Dispensation *retinere Diaconatum in Commendam*, If after the Bishop of that See (whereof he was the Dean and Head of the Chapter)

Temps. R. 2;
Fitz. tit. grants
104.

50. E. 3. title
Affize on Stat
them. acc.
V. 11. Fliz;
Dyer. 282.

Cook 1. part;
Institute 301.

P. This Case.
Reported 3.
Car. in Latches
Reports, 234.

do make a Lease of parcel of the possessions of the Bishoprick, the Confirmation of the Lease by the Commendatory Dean is good, as it was adjudged in 3. Car. in the Kings Bench in *Evans* and *Ascouges* Case.

43. E. 3. 23.

There is another Rule in Law, viz. That *Prelatus Ecclesie sue conditionem meliorare potest, deteriorare nequit*. And therefore if a Bishop, Parson, &c. purchaseth Lands to him and his Successors, he himself afterwards cannot wave the purchase; but his Successor upon just Cause shewed, viz. upon Cause shewed, That the Rent to be paid upon the purchase is of greater yearly value then the Land purchased is, may wave such purchase made by his Predecessor. And so, if a Prebendary, Parson, Vicar, or other Corporation Spiritual be seized in the right of their Churches, They cannot disclaim in that thing which was seized in the Church, because they cannot divest by their Disclaimer that thing which was vested in their Church: But if a *Quo Warranto* be brought against such Bishop,

46. E. 3. 27.

5. E. 4. 1.

6. H. 3. 51.

26. H. 6. 46. a.
by Markham.

6. E. 3. 52.

shop, Prebendary, Parson, &c. by the King for Liberties, or Franchises usurped by them from the King: in such special Case they may disclaim in the said Liberties or Franchises, and such Disclaimer shall bind their Successors.

If a Bishop make any Lease, grant any Rent Charge, enter into any Warranty, or doth any other act or thing, which tendeth to the Diminution of any of the Revenues which ought to be, and continue for the maintenance of his Successor; If the Bishop be deposed, translated, removed, or dyeth, the Successor shall avoid such Lease, Grant, Charge, Warranty, &c. But if a Bishop, being both Patron and Ordinary, doth Confirm a Lease made by the Parson without the Dean and Chapter, and after the Parson dyeth, and the Bishop Collates another to the Benefice, and is afterwards deposed, translated, or dyeth, yet the Confirmation of that is, and stands good, because there the Revenues which are to maintain the Successor, are not thereby diminished.

If a Parson, &c. bringeth a Writ

Cook 1. part,
Instit. 370.

27 H. 6. Fitz.
tit. Garranty.
48.

of *Juris utrum* for any thing which concerneth the Church, and the Defendant pleads in barr the Warranty of his Predecessor or Ancestor, the Plaintiff shall not be barred by such Warranty, for that the Parson demandeth the thing in the right of his Church, and in his politick Capacity : And so it is if the Parson bringeth an Assize ; although that thereby he recovereth the Land, and he himself is to take the profits to his own use ; yet because after the Recovery, he is seized of the Freehold whereof the Assize was brought in the Right of the Church, a Warranty of his Predecessor or Ancestor pleaded in barr shall not barr him. The like Law is of an Archdeacon, Prebend, Vicar, &c. for the possessions concerning their Archdeaconry, Prebendary, or Vicarage, they shall not be barred by any Warranty of their Predecessors or Ancestors.

If there be Lord Mesne Prior and Tenant, the Mesne cannot be forejudged in a Writ of Mesne within the Statut. of Westm. 2. Cap. 9. because he cannot do any thing to the

the prejudice of his house, or Church: and so is the Law of a Bishop, Parson, Vicar, &c.

A Prebendary, Parson, Vicar, &c. for the benefit of their Churches, shall be esteemed to have the Fee-simple of the Gleab Lands in them; For they shall have and main'tain an Action of Wast for Wast Committed in the Gleab, and in the Writ it shall be said, that the Wast is *ad Exbarredationem Ecclesie*: but a Parson, Prebendary, Vicar, &c. cannot discontinue the Fee of the Gleab; And if they make Leases for years, reserving Rent and dye, their Leases are now void by their deaths, and no acceptance of Rent by their Successors shall make such void Leases to be good; Otherwise it is, if they make Leases for lives; there the acceptance of the Rent by the Successor will make such Leases good, because the Leases were not void, but voidable only; But if a Bishop, Abbot, Prior, &c. make Leases for years and dye, and the Successors do accept of the Rent, they shall never avoid the Lease, for that the Leases were not void, but voidable. But

Crok 3. part 65. in Penants Case.

all Leases made by them at this day must be with, and under the Proviso's and Limitations in the precedent Chapter before mentioned ; otherwise the Leases will not be good.

CHAP. VI.

Of Advowsons in general ; The Original of them : How they first began, and who were the first Founders of them. And in whom the Patronage of all Advowsons was first settled.

I Do not find that in, or by any Record which I could yet see, nor is it mentioned in any of the books of Terms, or in any other books of the Common Law of *England*, when Advowsons had their first Original within these Islands of *England*, *Scotland* and *Ireland*: But this I do conceive, that in the Saxons times, after the first Division of the Realm of *England* into Parts or Counties, and after the

6. Chap. 6. *Parsons Law.*

the conferring of great Lordships, Mannors and Lands to the Lords, Peers, and great Persons of the Realm, and others; and after Seigniories were first erected and established within the said Realms; and after the first planting of the Christian Faith within these Islands of England, Scotland and Ireland, (which I do not find to have been before the Saxons taking of the Government of these Nations) I do conceive, that then, and not before, that the Kings of these Islands did first begin to erect Cathedral Churches, Create Bishopricks, erect Monasteries, Abbies and Priories, and other Religious houses for the receiving into them of such persons as professed the Christian Faith: and that afterwards in imitation of the said Kings, particular Lords of great Seigniories, Lordships and Lands, and other persons of Abiluy did upon parcel of their Demesne Lands build and erect particular Churches, and endowed them with sundry parcels of Lands, and with other profits and immunities for the better maintenance of such persons

persons as took upon them the publishing and defence of the Christian Faith, reserving unto the several Founders of the said Monasteries, Priories and Churches, a Right and power to confer and bestow the said Abbies, Priories, Churches and Lands, and other things to them annexed, and with which they were endowed, unto such persons as they should think fit to confer the same upon, to be to them and their Successors for ever: And hence it was, that it was said by *Par- ming* in 7. Ed. 3. Fitz. title *Quare impedit* 19. That by the Grant of the Church, the Advowson thereof did pass: and that there also *Herle* Justice said, That long a man did not know what Advowson was, but when he would give the Advowson, he only said, that he gave the Church. And for the word (Advowson) I find in 30. E. 3. 21. Fitz. tit. *Quare impedit* 5. That the same is not appropriated to a Church only, but to other Ecclesiastical Foundations, as namely to a Priory, or others: For I find, that *John de Boys* brought a *Quare impedit* against the

7. E. 3. tit. *Qu.*
Imp. 19.

30. E. 3. *Qu.*
Imp. 5.

the Bishop of *London*, and counted,
 that he was seized of the Priory of
W. to which the Bishop had disturb-
 ed him to present, and therewith
 agree divers others of our old year
 books, as 24. E. 3. Qu. Imp. 27.
 6. E. 3. Qu. Imp. 38, and 11. E. 3.
 Qu. Imp. 107.

24. E. 3. Qu.

Imp. 27.

6. E. 3. Qu.

Imp. 38.

11. E. 3. Qu.

Imp. 107.

An Advowson then in general, is
 a Right of Presentation, which the
 Founder of any Monastery, Abby,
 Priory, Church, Chappel, hath re-
 served unto himself, his Heirs, or
 Successors upon the Foundation
 thereof, to confer or bestow the
 same so often as the same shall hap-
 pen to be vacant, or become void,
 to, and upon any person or persons,
 who is, or are capable to receive the
 same; and fitly may be applyed
 unto any thing of which a man may
 have a *Quare Impedit* if he be dis-
 turbed in the Donation of, or Pre-
 sentation to the same; as appeareth
 by these books and Authorities fol-
 lowing; that is to say, if he be dis-
 turbed in his Presentation to, an
 Abby 22. H. 6. 25. 25. E. 3. Qu.
 Imp. 16. 10. E. 3. 32. 29. E. 3.
 Q1. Imp. 151. 11. H. R. 2. Fitz.
 tit.

tit. Brief. 643. 29. E. 3. Qu. Imp.
 290. To a Prebend, 7. E. 3. Qu. Imp.
 21. 31. E. 3. Qu. Imp. 165. 13.
 R. 2. tit. Brief. 163. To a Vica-
 rige, 5. E. 3. tit. Qu. Imp. To a Pri-
 ory, 17. E. 3. Qu. Imp. 70. To a
 Deanery, 21. & 29. E. 3. Qu. Imp.
 26 & 18. To a Chappel, 17. E. 3. 13.
 And Fitz. Na. Brevium 33. To a
 Chauntry which is Donative.

Advowson is called by some Pa-
 tronage, or a Right of presenting
 to the Church: *Cowell* in his title
Patronus saith, *Jus Patronatus est jus*
presentandi Clericum ad Ecclesiam
vacantem ex parte ei Concessum, qui
Consentiente Episcopo vel instruxit,
vel dotavit Ecclesiam. And *Bracton,*
Advocatus est, ad quem pertinet jus
Advocationis, ut ad Ecclesiam Nomine
proprio, non alieno possit presentare.
 They who were Patrons were some-
 times called *Advocati*: because as
 Advocates do defend the Causes of
 their Clients, so the Patrons did
 take upon them to protect and de-
 fend their Churches and their Pre-
 sentees thereunto, against all usurp-
 ers of the same. And hence it is
 that they were sometimes called
Patroni

Patroni à Patrocinio, from defence. For being the first Founders of the Church, and endowing them with Lands, Livings, and other immunities, priviledges and things, there was reserved to them, their Heirs and Successors (as before is said) the full and only power of disposing of the said Churches upon all Avoidances of the same, and of the providing of a Competent & fitting Incumbent for the same, and therefore saith a Learned Civilian, *Teneatur Patronus protegere Ecclesiam, & reparare si minuetur ruinam, & de bono Sacerdote providere.*

The Right of Presentation, or of Patronage is a real right fixed in the Patron or Founder of the Church & his Heirs or Successors for ever: & is the same and the like, which Founders of Abbies, Priories and Monasteries have, or had to their Abbies and Priories. And the Patrons of Advowsons of Churches have and ever had as absolute property and Ownership in and to their said Churches, as any other man had or hath to any other his Lands, Tenements and Hereditaments whatsoever, as ap-
peareth

9. E. 3. Qu.
Imp. 30.

peareth by several of our Book Cases, viz. 8. Aff. 29. 13. Aff. 22. 11. H. 4. 64. I shall cite but two Cases more to prove the same. Pasch. 9. E. 3. Qu. Imp. 30. A. was Patron of the Priory of *Spalding*, and by Deed Indented between A. the Patron, and B. the Prior, it was covenanted, That at every Avoidance of the Priory, That they should not have any thing in the Priory, but only for to choose their Prior, to be maintained out of the Priory, saving unto A. the Patron and his Heirs all Presentations to Churches which should fall void: In a *Quare Impedit* brought against the Sub-Prior and Covent by A. the Patron, for a Presentation to a Church annexed to the Priory which became void, it was adjudged, that by the saving, the Advowson of the said Church did remain to A. the Patron and his heirs; and upon the acknowledgement of the Deed aforesaid A. had a Writ to the Bishop to admit his Clerk to the said Church.

38 Aff pl. 22.

38. Aff. p. 22. The Prior of *Plympton* Case, that the King founded

ed the Chappel of P. and endowed the same with two Hides of Land : The King was the Patron. And although afterwards the Chappel and Lands came to the hands of a Prior, which Priory (after the gift) was founded by the Bishop, and the King after the Foundation of the said Priory, did grant to the Prior and Covent *quod transferre & tenere possint Ecclesiam*, and did also grant the two Hides of Lands *Canonicis quos Episcopus posuit*: Yet in that Case, because the King by his Charter doth not grant the Patronage by expresse words, It was adjudged, That the King remained Patron. And although the Prior after the Foundation had presented time out of mind to the Chappel, yet it was adjudged, That the same did not take away the Kings title of Patronage.

CHAP.

CHAP. VII.

That the Right of Patrons to Present to Adwomsons of Churches, is a Temporal, and not a Spiritual Inheritance.

THE Right of Patronage, or of Patrons to Present to Churches and other Ecclesiastical Dignities and Promotions, being the same with the Right of Founders, as by the books of 8. E. 3. & 13. Ass. is said: and the Common Law having reserved the power of Conferring of Benefices upon the Avoydances of the Churches by Death, Resignation, or otherwise, to the Patrons and their heirs: It is now to be seen by what authorities and reasons, collected out of the books of the Common Law, this Right of Presentment is proved to be a Temporal Inheritance in the Patron and his heirs, and not an Inheritance which is Ecclesiastical.

I shall set forth, shortly, some reasons, and back them with au-

authorities of Law. First, It is proved to be a Temporal Inheritance, because an Advowson, or the right of the Patron to Present may be Appendant unto, and is parcel of a Mannor many times which is a Temporal Inheritance, as it is said in 5. H. 7. 37. b. And the Appendant must be of the same nature and condition as the Principal is. i. When a Mannor was first created, and Land parcel thereof was given to build or erect a Church upon it, the Advowson of that Church became Appendant to the Mannor, which was a Temporal thing; and therefore it hath been holden, That by the Grant of the Mannor, *cum pertinentiis*, that the Advowson of the Church passed thereby.

In 33. H. 6. 33. if a man be disseised of a Mannor unto which an Advowson is Appendant, and the Church becomes void; and the Disseisee doth after enter into the Mannor, the said entry shall vest the Advowson again on the Disseisee, because the Advowson is parcell of and Appendant to the said Mannor; and therewith agree the Books

of 9 E. 3. 39. and 19 H. 6. 33.

Cook 10 part,
Whistlers
Case.

In Cook. 10. part in *whistlers Case*.
If the King be seized of the Mannor
of D. to which the Advowson is
Appendant, and Leaseth the Mannor
to I. S. for years, excepting the
Advowson, and afterwards the King
by his Letters Patents grants *totum*
illud Manerium de D. cum pertinen-
tiis to I. D. in Fee, *exceptis quæ*
in eisdem Litteris Patentibus excipun-
tur. Et ulterius, grants *Manerium*
prædict, & omnia & singula præmissa
cum pertinentiis adeo plene & integre &
in tam amplis modo & forma prout præ-
missa ad manus nostras devenerant :
It was adjudged in that Case, That
by the Grant of the Mannor without
making mention of the Advowson,
that the Advowson passed, because
it was parcel of an appendant to the
Mannor : But if the Advowson had
been severed from the Mannor and
been in gross, that by the Grant of
the Mannor, the Advowson had not
passed without special words of the
Advowson in the Grant; No more
then it did in the Case in 38 H. 6. 26.
the Abbot of *Syons Case*; where the
Case was, That the King was seized
of

of the Mannor of D. to which an Advowson was Appendant, in the right of his Crown; and by his Letters Patents Leased the said Mannor (amongst other things) to A. and B. his wife for the Term of their lives, and afterwards the King reciting the said Lease, for the lives of A. and B. granted *Manerium prædictum* which A. and B. held for their lives, unto C. D. and E. and their heirs. It was holden in that Case, that because the Advowson was not mentioned in the Grant, but in the *Habendum* only, That the Advowson did not pass by the Letters Patents to the said C. D. and E. because the said Advowson remained in the King as in gross, and was not mentioned in the Grant, but in the *Habendum* only. But if the Advowson had been before in the words of the Grant, before the *Habendum*, then the Advowson had passed unto them.

Secondly, An Advowson is a Temporal Inheritance, because it lieth in Tenure, and may be holden either of the King *in Capite*, as the Book of 12 H. 7. 19. is; or of a common person, by 21 E. 3. 5. where a *Quare* 21 E. 3. 5.

Impedit was brought against the Abbot of *Welbeck*, and the Plaintiff there counted, That the said Abbot held the said Advowson of him by Homage, Fealty and Escuage.

33 H. 6. 34.

33. H. 6. 34. b. in a Writ of Annuity brought by the Prior of *Castleacre*, against the Prior of *Bentley*, the Defendant pleaded, That he was seised of the Advowson of *Aspall* in the County of *Sussex*, *ut de feudo & jure Monasterii sui de Bentley*, and that he held the Advowson of the Prior, of *Castleacre* by the service of Fealty, and 2. s. 8. d. per an. And it was there agreed, That an Advowson doth lie in Tenure, and that the Lord might distrain in the Gleab Lands for the Rents and Services, the Cattle of the Patron, if he found any upon the Lands, but not the Cattle of a stranger.

22 E. 3. 3.

In 22. E. 3. 3. a Writ of *Cessavit* was brought against *John de Gremesley* Parson of the Church, where the Tenant demanded the View, and he was ousted of the View, because it was of his own Cesser; and afterwards he prayed in Aide of the Patron and Ordinary, and the Aide

Aide was granted him.

24. E. 3. 46. a. in a Writ of Right ^{24 E. 3. 46. a.}
of Advowson, it is said, That the
Tenant shall be summoned in the
Gleab of the Church: And so it is in
a *Quare Impedit*; the Summons must
be in the Church; and to conclude
this reason, The Writ of Right of
Advowson it self doth suppose a
Tenure; for the words of the Writ
are, *Quod clamat tenore*, as the Book
of 15. H. 8. is by all the Justices.

Thirdly, That an Advowson is a
Temporal Inheritance, it appeareth in
this, that a *Præcipe quod reddat* lyeth
thereof, as the Book 20. E. 4. 15. is,
That the wife may be endowed
thereof, as the Book of 19. E. 3. <sup>19 E. 3. *Quare*
Imp. 154.</sup>
Fitz. tit. Quare Impedit, 154. is; ^{7 E. 3. 66.}
That the Husband may be Tenant ^{3 H. 7. 5.}
by the Curtesie thereof, as 7 E. 3. ^{5 E. 4. 7.}
66. 3. H. 7. 5. and 5. E. 4. 7. is:
That it may be forfeited and lost by
Attainder, Usurpation, Recusancy,
Outlawry, as the Books of 9. H. 6.
57. and Cook 10. part 55. are. That
it may be divided betwixt Parceners
either by word or writing, as Cook 1. Cook 2. part;
part, *Institur.* 164. 13. E. 2. *Quare Inducit* 154.

34 H. 6. 40. *Impedit*, 170. 5. H. 7. 8. and 34. H. 6. 40. are; That it may be given in Exchange for other Temporal Inheritances, as 11 H. 4. 54. is. That it is valuable, and shall be Assets in a *Formedon*, as the Books of 5 H. 7. 37. 32 H. 6. 25. and 33 H. 6. title *garantry* 33. are. That by the Grant of all Lands and Tenements, an Advowson will pass, as is said in 11 H. 6. 4. by *Martin*. And although it passeth not by Livery and Seisin, (although that some Books are that it may pass by Livery of the ring of the Church door, as the Books of 43 E. 3. 1. and 6 H. 7. 3. by *Townsend* are) Yet by Deed it is grantable ever, as all other Inheritances are, and the delivery of the Deed of Grant of it, shall stand in the place of Livery made of the Church it self: as it is said by *Cook* in the first part of his *Institutes*, 46. & 335. And *vid.* 49. E. 3. 60. 6. H. 7. 14. That in ancient times the Patrons upon vacancy conferred the Church unto and upon the Incumbents, without Admission, Institution and Induction, by these words onely, *Accipe Ecclesiam*, which was called the Patrons committing

5 H. 7. 37.
31 H. 6. 25.

11 H. 6. 4.
by *Martin*.

43 E. 3. 1.
6 H. 7. 3.

Cook 1. part,
Institur. 46.

mitting of the Church to the Incumbent.

CHAP. VIII.

Of Advowsons, Appendants, and in Gross; To what they may be Appendant, and by what and whose Acts they may be severed and made Disappendant.

MR. Littleton in his Chapter of Villienage saith, That Advowsons are either Appendants or in Gross; and in 5 H. 7. 9. it is said, 5 H. 7. 9. That Appendancy is evermore, or for the most part by Prescription; and therefore *vid.* 13. Eliz. in *Dyer* 299. *Vid.* 13. Eliz. *Dyer* 299. If a man brings a *Quare Impedit* for disturbing him to present to an Advowson appendant to his Mannor, he needs not in his Count for to shew how it became Appendant, or how the Plaintiffs turn doth commence to present: For that the Advowson being Appendant, and he having title to the Mannor, it is apparent that the same Appendancy is by Prescription, and doth pass to the Mannor or Lands

E 4 unto

Vid. 15 H. 7.
19. by Fincux
etc.

unto which it is Appendant, unless that it be severed from the Mannor by Grant, by Deed, or by a Partition, or some other Legal act.

But yet note; That Prescription cannot make a thing to be Appendant, or Appurtenant, unless the thing Appendant or Appurtenant doth agree in quality and nature unto the thing unto which they are Appendant or Appurtenant. *Vid. Plow. Com.* 168. and *Cook* 1. part, Institut. 122. acc.

1 H. 7. 24.

In 1 H. 7. 24. b. in an action of Trespass where the Defendant claimed to have *Liberam Faldam*, there it is said, He must shew, that the same is Appendant to some Land; for *Libera falda* is nothing else but the Lord to have the sheep of his Tenant to fold upon his Land in the night time, for the better manuring of his Lands, which thing cannot be in Gross, but alwayes is by reason of Lands, as it was said by *Keble*, and agreed by the whole Court.

9 E. 6.
Dyer 70.
8 H. 7. 4.
& 5.

In 5 E. 6. *Dyer* 70. 8 H. 7. 4 & 5. and in *Cook* 1. part, Institut. 122 Those things which are Appendant, must be Appendant to things which are

are of a Superior Nature, and which may have a perpetual subsistence and continuance; and therefore it is there agreed, That an Advowson cannot be appendant unto Rents or Services which may be extinguished or discharged, and therewith agreeth Cook 4. *Terringshams Case* for a Common appendant, which is of Common Right, and must be appendant unto arable Lands which may have a continual and perpetual subsistence for ever.

In Plow. Com. 169. & 170. Plow. Com. 169, 170.
Which are Incorporeal, cannot be Appendants, Fairs, Services, or other Inheritances which are Incorporeal: But an Advowson may be appendant unto the Demesnes of a Mannor, or unto Honours, Castles, or other Lands or things Corporeal which may have a Continual being, or subsistence.

An Advowson cannot properly, and in strictness of Law be said to 7 E. 4. 20. be appendant to an house for habitation; yet in 7 E. 4. 20. in a *Quare Impedit* brought for disturbing him to present his Clark to the Church, the Defendant did plead, That one

one I. was seized of an House unto which the Advowson was appendant in his Demesne as of Fee, and gave the same house with the appurtenances unto the Ancestor of the Defendant in rail, &c. But I take the Law to be, That the plea there must have this Construction, That the Advowson was appendant unto the Land upon which the house was built, and not to the house *quatenus* an house of habitation only: For that by a secondary means, an Advowson may be appendant to an house, or unto another Church or Chappel.

10 H. 7. 13. b.
by Keble.

10 H. 7. 13. b. By Keble, If I. be seized of an house with an Advowson appendant, and afterwards the house doth decay, and fall down, I. shall have the Advowson by reason of the soil, and the Advowson shall be said to be appendant to the Land upon which the house stood.

16 H. 7. 9. by
Rede.

16 H. 7. 9. by Rede, If I. have Common Advowson, or Wreck appendant to an house which after falleth down, yet I. shall have the said appendancies, because that the soil which is the substance of that to which

which the appendance is, continueth.

18 Eliz. Dyer. 350; 351. A man was seized of the Advowson of a Vicarige, which was appendant to the Rectory of *West Bodwin*, and was attainted of Felony, which was concealed from the Crown in the time of King E. 6. The Queen afterwards granted the Rectory, & *omnia tenementa parcell. spectant. dict. Rector* to I. S. In that Case, it was holden, That a Vicarige might be appendant to a Rectory, and that by the grant of the Rectory by the Words aforesaid, That the Advowson of the Vicarige did pass unto the Grantee.

Advowson in gross is; Where an Advowson which was appendant unto a Mannor of Lands, is, either by Grant, or by Conveyance, or Deed, or other wayes severed and divided from the Mannor or Lands unto which the same was before appendant.

If a man be seized of a Mannor to which an Advowson is appendant, and by Deed granteth one acre belonging to the Mannor *una cum advocacione Ecclesie*, and further

ther by the same Deed giveth and granteth the same Advowson, The question in that Case was, Whether the Advowson did pass as appendant to the acre, or as an Advowson in gross; and the better opinion of the book 33 H. 8. 48. in Dyer was, that by that Grant, the Advowson was severed from the Mannor, and was become in gross; for notwithstanding that there was but one Deed; yet there being several Grants and Clauses in the same Deed (and every mans deed shall be taken strongest for him to whom the Grant is) and it was more beneficial for the Grantee to have the Advowson in gross then appendant to the acre of Land; It was holden therefore in that Case, that the Advowson did pass as in gross. But in that Case, If the whole Mannor had been granted, then the Advowson had passed as appendant, and not otherwise, or in gross.

In 48 E. 3. by *Finchden*. If a man grants the Mannor of D. to which an Advowson is appendant, and by the same Deed the Advowson of the Church of D. so as it is named

in gross, yet it shall pass as appendant.

45 E. 3. A Fine was levied of a Mannor to which an Advowson was appendant, by which a third part was rendred back to one for life with divers Remainders over, and so of the two other 2. Parts with the Advowson of every 3. Part as aforesaid: In that book it was debated who should have the first avoidance, and it was holden, notwithstanding the Division aforesaid, and the naming of the one before the other, that the persons remained Tenants in Common of the Advowson, so as if they could not agree in their presentment, that Laps should incur to the Bishop, and there was no prerogative given to him who was first named, nor any prejudice to the last named, being by one deed, and passing as it were *uno flatu*, the Advowson did remain appendant as it was before.

In 14 Eliz. Dyer. 311. in *Cromwell* 14 Eliz. Dyer. and *Andrews Case*, If a man bargains, sells, gives, grants a Mannor, and an Advowson to one, and afterwards levieth a Fine, or enrolleth the

the Deed, in that Case it was holden by the Lord Dyer, that the Advowson did pass by the bargain and sale as in gross before the enrolment of the Deed. But notwithstanding that opinion, I do conceive That the Advowson cannot pass, unless the Deed be enrolled, and then it shall pass as appendant, and not in gross, by reason of the intent of the parties.

In 9 Eliz. Dyer, There were two Advowsons in *Illesfield*. viz. St. *Martins* appendant to the Mannor of *Illesfield*, and *All Saints*, which was an Advowson in gross; and the Churches by the Consents of the Ordinaries and Patrons were united; and it was agreed betwixt the parties, That the Patron of the Advowson in gross should have the first Presentment, and so they should present *alternis vicibus*; In that Case, It was adjudged, That notwithstanding that, That the Advowson of the Church of St. *Martins* did still remain appendant for every second Presentation, and that the Appendency was not destroyed thereby.

43 E. 3. 35. a. In a *Quare Impedit* the Plaintiff Counted, That H. was seized of the Mannor of F. to which an Advowson was appendant, and that one R. brought an Assize of Darrein Presentment against him: and upon a Fine afterwards levied, it was agreed betwixt them, That R. did acknowledge the same to be the right of H. For which Consens H. granted that R. should present first, and after that A. and then R. *alternis vicibus*. H. dyed, by which the Mannor descended and came to his Daughter; and the Church became void by the Death of the Clark of R. The heir of H. presented and died, and afterwards R. died, and S. the heir of R. presented; the Defendant pleaded, that the daughter of H. did infeoff him of the Mannor to which the Advowson was appendant. In this Case Exception was taken to the Plaintiffs Count, because he claimed the Advowson as appendant to the Mannor of F. for by the Count it was proved, that the Advowson was in gross; for by the Composition by the Fine they ought to claim the Advowson as in gross.

gross. But it was said by *Boltnap*, That he who brought the Assize of *Darrein Presentment* did acknowledge the Advowson to be the right of the other who was seized of the Mannor, and that by his acknowledgement, that the Advowson was not of other Condition then it was before, and that by the Grants of the Presentments back again to him, that was in his own person did remain in him in the same Condition it was before the grant, and that was that the Advowson was appendant to the Mannor: But if he who was seized of the Mannor had acknowledged the Advowson to have been the right of the other, *viz.* the Conuttee, then by such Conusans the Advowson had been in gross, because it had been severed from the Mannor by the Conusants, and then by No grant *ex post facto* it could have been appendant again: and therefore the Count was holden to be good.

But Note, that in some Respects by Act in Law an Advowson may be at one time appendant, and at another time in gross.

13. E. 3. Qu. Imp. 170. If a Man-
 nor be divided betwixt Coparceners,
 and every one hath a third part of
 the Mannor allotted unto them, no
 mention being made of the Advow-
 son, in that Case the Advowson
 remains in Coparcenary and in gross,
 and yet in every of their Turns it is
 appendant to that part which they
 have: which appears by the book of
 45. E. 3. and Cook 1. part Instit. Cook 1. part
Instit. 1229
 122.

5. H. 7. 2. A man was seized of
 four Mannors; to one of which, an
 Advowson was appendant, and had
 issue four daughters, and dyed; the
 daughters made partition of the
 Mannor without making of any
 mention of the Advowson; and the
 Mannor to which the Advowson
 was appendant, was allotted to the
 youngest daughter for her part.
 Upon argument and debate by all
 the Serjants and Judges, It was re-
 solved, That the Advowson upon
 partition was severed and did remain
 in gross, and upon the Composition
 made that the Coparceners should
 present to the same in their Turns;
 and yet in that Case it was holden;

F

That

That if all the Sisters dye but she to whom the Mannor with the Advowson appendant was allotted, That the Advowson became appendant again to that Mannor; but because upon the Partition there was an exprefs exception made of the Advowson, it was holden (as before is said) That the Advowson remained in Coparcenary in gross. *V. 21 H. 6. 32. and 38 H. 6.* But *Quere*, the difference betwixt this Case, and the Case in 19 E. 3. *Quare Impedit* 59. For there a *Quare Impedit* was brought; and the Plaintiff Counted, that A. was seized of a Mannor to which an Advowson was appendant, and presented and dyed, and that afterwards the Mannor descended to his two daughters who made partition of the Mannor, and that the Church was void by the death of the Clark of A, so as he having the estate of the eldest daughter ought to present, but made no mention of agreement to present by turns. *Shipwith* took exception to the Count, because the Plaintiff did suppose that the Advowson was appendant to the Mannor, whereas

21 H. 6. 32.

19 E. 3. *Qu.*
Imp. 59.

whereas by the partition the Advowson did remain in gross; and the exception was disallowed by the Court, because the Advowson did remain appendant as it was before; I conceive the reason of the difference betwixt this Case, and the Case of 2. H. 7. 5. to be, because in ^{2 H. 7. 5.} this Case there was no particular exception of the Advowson, as in the Case of 2. H. 7. there was; *quod Nota.*

As all Advowsons which are appendant unto Mannors or Lands, may be severed, and divided from the Mannors or Lands by lawfull deeds of grant and Conveyance, and also by exception made become Disappendant and in gross: so likewise may they be severed and divided by tortious and unlawfull acts, such as are Discontinuances of the Mannors or Lands, to which they were appendants: by Disseisins and Usurpations; In some of which Cases, the lawfull Patrons, (if the Church do become void) shall not present unto the Church untill they have recontinued, or entered into the Mannors or Lands;

and in other Cases they may present to the same avoidances before any Entry made, or Recontinuance of the Mannors or Lands.

3 H. 4. 8.

In 3. H. 4. 8. If a man be seized of a Mannor to which an Advowson is appendant, if he be Disseized of the Mannor, and then the Church doth become void, he may present unto the avoidance before his entry into the Mannor or Lands, because by the entry, the possession of the Disseisor of the Mannor is defeated, and so every estate which he hath made of the Advowson which was appendant to the Mannor, is also defeated by *Tirwit*; and therewith agreeth the book of 9. E. 4. 39. by *Brian*, who held, that if a man be disseized of a Mannor to which an Advowson is appendant, and afterwards the Church becomes void, he may present unto the avoidance before his entry into the Mannor, and notwithstanding that the Disseisor be seized of the Mannor: For the Advowson is severable from the Mannor, and therefore he may present unto the Advowson notwithstanding that he hath not the Mannor

9 E. 4. 39. by
Brian.

nor or Lands to which the Advowson is appendant, *V. 21. H. 6. 19. 21. H. 6. 19. 32. H. 6. 33. and 14 H. 6. 16. acc. 32. H. 6. 33.* But if the Disseisee dyeth seized of the Mannor, and then the Church becomes void, in such Case the Disseisee shall not present unto the avoidance before he hath entered into the Mannor. For it is holden for a Rule in Law, that a man shall never be admitted to the accessary or appendant, where he hath no right unto the principal, and his right in that Case is bound by the Dissent: See to that purpose Cook 1. part. Institut. 349. Where it is said, that the issue in tail shall not be remitted to Inheritances regardant, appendant, or appurtenant upon a discontinuance made of them, before he hath recontinued the Mannor or thing to which they were appendant, appurtenant, or regardant: But if a man be remitted to the principal, he shall be remitted unto the accessaries.

In 17 E. 3. 3. & 13. in *Greenwill* 17. E. 3. 3. & and *Rayles* Case it was holden, that 13. if Husband and Wife be seized of a Mannor unto which an Advowson

is appendant in the right of the Wife, and they present, and afterwards the Husband alieneth one acre of the Land with the Advowson to I.S. in Fee, the Church doth become void, and I.S. doth present and afterwards dyeth, and his heir doth enter into the acre, and then the Church doth become void again; That the Wife shall not present untill she hath recontinued the Land by her *Cui in vita*, because the Advowson was appendant to the acre: But if the Advowson had been severed from the acre and been in gross, as if I.S. or his heirs had aliened the acre except the Advowson which made it in gross, and then the Husband had died, and the Church had become void, then the Wife might have presented to the same avoidance; and if she had been disturbed, she might have had a *Quare Impedit*. But *Quere* of that Case; For that now by the Statute of 32 H. 8. cap. 28. The Wife may present before she recontinueth the Lands, because no alienation of the Husband shall be prejudicial to the Wife.

Stat. 32 H. 8.
cap. 28.

In 8 R. 2. *Quare Impedit*, 199. A. 8 R. 2. *Qu.*
Imp. 199.
Quare Impedit was brought, and the Plaintiff Counted, That I. S. was seized of an Acre of Land to which an Advowson was appendant, and presented one B. who was admitted, Instituted and Inducted; and that afterwards I. S. gave the acre of Land with the Advowson to the Plaintiff, and that the Defendant did usurp upon the Plaintiff by presenting of one F. to the Church which was void, and that the Plaintiff entered into the acre, and that the Church then became void again; The Defendant made a title to the Land before the Plaintiff had any thing therein, and traversed the Disseisin and Usurpation alleged; In that Case, It was holden by the Court, That because the Plaintiff who was disseized, had entered into the Mannor of which he was disseized, that the Advowson was recontinued again in him which was severed by the Usurpation, and that he might present.

19 H. 6. 30. In a *Quare Impedit* 19 H. 6. 30.
 the Plaintiff counted, that his Grandfather was seized of a Man-

nor to which an Advowson was appendant in tail; and aliened two parts of the Mannor with the Advowson in Fee, and that afterwards the Alience granted the Advowson to a stranger, and that his Father brought a *Formedon* of the two parts, and recontinued the Land; and Exception was taken to the Count by *Yelverton*, because the Plaintiff did not shew the Deed of Grant, nor pleaded the same; But the Exception was disallowed by the Court, because the Plaintiff claimed in *per formam doni*. Another Exception was taken to the Count, for that the Count was *jus duarum partium Mannorii, &c. & advocatio prædict.* did descend to him; & that could not be; for it could not be that the Advowson did descend to him in possession; For that the two parts of the Mannor to which the Advowson was appendant, came to him as heir to his Mother, & that the Father had aliened as aforesaid, and that after his alienation he presented in the right of his Wife, which was a Remitter unto the Wife as to the Advowson; wherefore the Plaintiff mended his Count, viz.

Quod

*Quod ius duarum partium & advocatio-
nis prædictæ* did descend; In which
Case it was agreed, that by the
bringing of the Formedon the Land
was recontinued in the issue in tail,
and so the Advowson reverted again
in him, and appendant again to the
two parts of the Mannor, which
was severed by the Grant and Usur-
pation aforesaid.

14 H. 6. 16. a. It is agreed by the 14 H. 6. 16. a.
whole Court, That if a man be sei-
sed of an Advowson appendant; and
is disseised of the Mannor to which
the Advowson is appendant: and
the Disseisor presents, and after-
wards the Disseisee doth enter upon
the Disseisor, and then the Church
doth become void again, and the
Disseisor doth disturb him to pre-
sent, that he shall have a *Quare Impe-
dit* against him: But otherwise it
is of an Advowson in gross, that
he hath no remedy but a Writ of
Right: so note the difference; and
the reason is, because when he en-
treth into the Mannor to which the
Advowson is appendant, the pos-
session of the Disseisor is utterly
defeated: and therewith agreeth
24. H. 8.

24 H. 8. 8. Dyer. 4. where it is said, that the Disseisee of a Mannor to which an Advowson is appendant, cannot present after a Discent, till he hath recontinued the Mannor to which the Advowson is appendant; but before a Discent his entry is Congeable, and therewith agree the Books before cited, viz. 5 H. 7. 35. Cook 3. part, the Marques of *Winchesters* Case. Cook 1. part, Institut. 661.

6. H. 7. 35.
Cook 3. part,
Marques of
Winchesters
case.

Cook 1. part,
Institut 363.

Cook 1. part, Institut. 363. b. If the Patron of an Advowson be Outlawed, and the Church doth become void, and a stranger doth usurp, and presenteth his Clerk to the avoydance, & the six moneths do pass, and afterwards the King being entituled to the avoydance by reason of the Outlawry brings a *Quare Impedit* against the Incumbent who is in by wrong, and removes him; By this means, the Advowson is recontinued again to the Rightfull Patron, of which he was Ousted by the Usurpation; and if he doth reverse the Outlawry, and the Church doth become void again, he shall present.

In 18, Eliz. in the Common Pleas, it was adjudged, That if a man have three avoydances granted unto him of one Church at one time, and by one Deed; and the Church doth become void, and the Grantor usurps upon his Grantee, and presents his Clerk to the Bishop, who is admitted, Instituted, and Inducted; and afterwards the Church doth become void again, The Grantee shall present to the second avoydance, because the first presentation made by the Grantor, did not put the Grantee out of possession of all the avoydances.

CHAP. IX.

Of the Incidents to an Advowson; And first of Presentation, And the difference betwixt Presentation, Nomination and Collation.

HAVING in the former Chapters declared generally What Advowson is; It is requisite now that we take into Consideration the particular

icular parts thereof; It is first therefore to be known, That Presentation is the Principal Incident and Chiefest Quality to an Advowson; Which considered in it self, is nothing else but the nomination of a fit person to the Bishop or Ordinary of the Diocese to be admitted, Instituted and Inducted unto the Church or Benefice which is void.

Nomination, Presentation and Collation are *Synonima*, are commonly taken in Law for one thing and are of one sence, as it is said, 14 H. 7. 22. by *Kingsmil*, where-with agreeth 17 E. 3. 64. b. and yet they are sometimes distinguished in respect of the persons; And therefore if one man hath the Nomination of a Clerk to a Church or Benefice which is void, it hath been holden adjudged in our books, viz. 24. E. 3. 39. 1. H. 5. 1. & 2. 14 E. 42. b. 21 H. 6. 17. a. and other books, That he that hath the Nomination is the Patron of the Church, and shall maintain a *Quare Impedit* in his own Name, *presentare ad Ecclesiam*, and that which the Presenter doth, he doth but as servant

14 H. 7. 22. by
Kingsmil.

V. Plow. Com.
329.

to him who hath the Nomination;
 & *vide* If an Abbot hath the Presenta-
 tion, and another the Nomination
 to a Church which is void, and the
 Abbot surrendreth to the King; He
 that hath the Nomination shall have
 all; for the King shall not present
 for him, it being a thing undecent
 for the King to do any thing as ser-
 vant to another, as it was holden by
 the whole Court, 1. Car. in the Kings
 Bench, in *Dickenson and Greenhows*
Case: and *V. 14 H. 4. 11.* in a *Quare*
Impedit, where the Writ was, *Quod*
permittat Nominare ad Ecclesiam, and by
 the opinion of the whole Court, the
 Writ was abated, for that there is no
 such form of Writ; but it ought to
 be, *Quod permittat Præsentare ad Ec-*
clesiam.

Mic. 1. Cas.
 B. R. Dick-
 enson and
 Greenhows
 Case. Papham;
 155.

This Presentation, or Nominati-
 on, (call it which you will) is but
 in effect the offering of a Clerk unto
 the Bishop, or Ordinary, to be by him
 admitted and Instituted into the
 Church: It is not properly in it
 self a Deed: but it is an Instrument
 in the Nature of a Letter Mis-
 sive, directed to the Bishop, and is
 but the Patrons Commendations
 of

of a Clark to be Instituted into the Church : which Missive or Commendatory Letters, are usually in this or the like form, viz.

Reverendissimo in Christo patri, & Domino, Domino W. permissione divina Eboracensi Archiepiscopo, Angliæ Primati, & Metropolitano, ejusve in absentia Vicario suo in rebus spiritualibus generali. Prænobilis T. B. Baro de P. verus, & indubitatus Patronus Rectoriæ Ecclesiæ parochialis de H. salutem in Domino sempiternam : Ad Ecclesiam Parochialem de H. prædictæ vestræ Diocesis modo per mortem T. R. ultimi Incumbentis ibidem vacantem, & ad meam Presentationem pleno jure spectantem, dilectum mihi in Christo T. H. Sacræ Theologiæ Professore Paternitati vestræ Presento (or Commendo) humiliter supplicans ut præfatum T. H. ad dictam Ecclesiam admittere, ipsumque in Rectoriam ejusdem Ecclesiæ institui, & induci facere cum suis juribus & pertinentiis universis, cæteraque omnia & singula peragere & adimplere in hac parte quæ ad vestrum munus Episcopale pertinere videbantur dignemini cum favore : In cujus res, &c. This Presentation

sentation, Nomination, or Commendation, may be as well by Word, as by Writing, both in the Case of the the King, and of a common person.

In 11. Jac. in the Court of Common Pleas it came in Question, Whether that a Presentation made by the King unto an Advowson appendant to a Mannor parcell of his Dutchy of *Lancaster* under the Great Seal of *England* was good or not: & whether the same ought not to have been under the Seal of the Dutchy: it was Resolved in that Case by the whole Court, That the Presentment was well made; For that the Presentation was but the Kings Commendation of his Clerk to the Ordinary, and was not an interest of the Inheritance of the Advowson, but only that it was a thing concerning the Advowson, & but as a flower fallen from the stock, which did not now participate of the Root: and also for that the King might have presented by word only. And there, the Case between the King and the Bishop of *Chichester*. Mic. 8. in Jac. in Cook B. was affirmed for Law, That where the King had an Advowson in the right

Mic. 11. Jac. in Co. B. The King and the Bishop of *Lincoln* Case.

32 H. 6. 21, 22. acc.

29 E. 3. 24. Imp. acc.

Tr. 8. Jac. C. B. The King and the Bishop of *Chichester* Case. Cro. 2. part, Reports 247.

of

of his Ward, and presented to the Avoydance under the Great Seal, that the same was well made, although it was not under the Seal of the Court of Wards, for that the King might present by Word only; and his Presentation was but by his Commendation of the Clerk to the Bishop to be instituted into the Church. And *Stephen Gardners Case* was then and there vouched by Cook Chief Justice, where the Presentation of *Stephen Gardner* to the Deanery of *Norwich* was good, although the King in his Presentation did mistake and misrecite the Name of the Foundation of the Deanery, because that his Presentation was but his Commendation of the Dean, and did not touch the Inheritance of the Deanery: and *V. Mich. 3. Car. in the Kings Bench, Stephens and Potters Case: Cro. I. part, Rep. 70. & 71.* adjudged accordingly.

Pasc. 15. Car.
In *B.R. Nelsons*
and *Hamptons*
case.

Pasc. 15. Car. in the Kings Bench, the Case was, *A. and B. his Wife* presented to a Church, to which they had no right: the Husband dyed: the Question was, Whether that the Presentation did gain any thing to the

the Wife: It was adjudged in that case it did not, for that the Presentation was but a Commendation, and the act of the Husband only, and it was not like an entry into Land by them.

If the Lord present his Villein to the Church of D. which is void, it is no Enfranchisement or Manumission of him, as it was adjudged. Mic. 8. Jac. in the Common Pleas in *walers Case*; and so if the Lessor present his Lessee for years to an Avoidance of a Church, the same is no Surrender of his term for years, although that the Lessee doth accept of such a Presentation; as it was also adjudged in one *Topsfields Case* in the time of Queen Elizabeth: For that Presentations are but Commendations; which are things revokable, and are not of any value; and therefore they shall not be Assets to Executors: And therefore, If a Church doth become void in the time of a Bishop, and so remaineth void till his death, the King shall present to the same avoidance, and not the Executors or Administrators of the Bishop.

Mic. 8. Jac. C.
B. *walers Case*

Thus you see, What Presentation or Nomination considered in it self, and as a fruit fallen, and *pro hac vice*, of what force and estimation it is in the Eye and Judgement of the Law: But then, if you Consider it again as a Right, it is an hereditary Quality incident to the Advowson or Patronage of some value, esteem and benefit to the Patron, the same being a Power in him to prefer and enable his friend to a Benefice, of which the Patron himself perhaps is not Capable; In which Presentment if he be disturbed, he shall have and maintain a Writ of *Quare Impedit*, in which he shall recover his Damages, as I have said before.

CHAP. X.

*Who may Present to Benefices with Cure:
What Persons are Capable of Presentations: And what are Causes for the Ordinary to refuse the Clerk Presented; Where he must Certifie the Causes of his Refusal: and where he must give Notice thereof: where not.*

HAVING in the before going Chapter set forth, what Presentation or Nomination is; It doth necessarily follow, that I briefly declare unto you, 1. Who may be Patrons to present to any Church, or Chappel, or Benefice with Cure of Souls: 2. What persons are Capable of such Presentations; what not. And for what Causes the Ordinary may refuse the Clerk presented. 3. To whom, and at what time the Presentation must be made, and to whom Lapse shall encurr for want of Presentation.

For the first, An Alien Born, shall not present to any avoidance of a

Church in his own Right: But in Case that such Alien doth purchase an Advowson, and the Church doth become void, after Office found that he is an Alien, the King shall present; But an Infant may present in his own Name and Right; and if he doth not present within six moneths after the Church shall fall void, *Latchesse* shall be imputed unto him.

33. E. 3. Qu.

Imp. 46.

3 E. 4. 4.

3 H. 6. 5.

17 E. 3. p. acc.

If a *Feme Covert* hath title to present to a Church which is void, she cannot present by her self; but her Husband shall present; It hath been a Doubt, if the husband might present in the right of his Wife, without the Wife: But *V. 28. H. 6. 8. Quare Impedit* 85. where it is resolved, That the presentment must be by the Husband and Wife in both their names, and not by the Husband in his right, and in the Right of his Wife.

28. H. 6. 8. Qu.

Imp. 65. ad-judged.

But the Wife of the King, is as a *Feme Sole*, and is as it were a person exempt from the person of the King; (although in many Cases she shall participate of the Prerogatives of the King) and is of ability of her self, either to Grant, or to pre-

V. 18. E. 3. 2.

20 E. 3. 27 b

21 E. 3. Qu.

1 p. 46.

3. H. 7. 14. acc.

present to any Church which is void,
which doth belong unto her, with
out the King: And therefore in a
Quare Impedit brought by her Ple-
nary upon the Presentation of ano- *V. 18. E. 3. 32.*
ther, is no plea, nor barr against her, *24. E. 3. 35.*
no more then it is in the Case of *acc.*
the King: *V. also 31. E. 3. 32. b.*
where Plenary is no good plea *31. E. 3. 32. b.*
against the Lord, who entreteth with
in the year for an Alienation in *Morte-*
main.

If a Villein purchaseth an Ad-
vowson, and the Church doth be-
come void, the Lord shall present,
because the Lord upon such pur-
chase made by his Villein, may
come and claim the Inheritance of
the Advowson; and upon such
Claim; the Interest of the Advowson
shall be vested in the Lord; and upon
the avoidance of the Church, the Lord
in his own Right shall present to the
avoidance.

The Guardian in Socage shall *3. E. 3. tit Pre-*
not present to an Avoidance of the *sent 10.*
Church in the right and name of *7. E. 3. 39.*
the heir; because he cannot account *25. E. 3. 5.*
for the Avoidance; For he cannot *27. E. 3. 79.*
make any profit thereof: for that *acc.*

7. E. 3. 63.
 21. E. 4. 1. b.

would be Symonie, and so make his presentment void. Neither shall the Patron in a Writ of Right of Advowson alledge Explees, or taking of the profits in himself, but must alledge them in the Incumbent. Yet b. 14. E. 3. tit. Darrein Presentment 9. where it is said by *Birry*, That he hath seen the Guardian present in the name of the heir, with which agreeth the opinion of *Green*, in 20. E. 3. Darrein Presentment. But *Quere* of it: For the Books (as I conceive) must be intended of a Guardian by Knight Service, and not of a Guardian in Socage. But see 42 E. 3. tit. *Quare Impedit* 130. where it is said and agreed, that the presentment made by the Guardian in the Name of the heir, is a good title for the heir in *Quare Impedit* brought by him.

Men Outlawed, or Excommunicate may present, and their Presentations shall stand good untill such time as they be avoided: And generally, all persons who have abilities to grant, or to purchase, have abilities for to present unto Benefices with

with Cure of Souls, when the Churches do become void.

Secondly, No person whatsoever is Capable to be presented unto a Benefice with Cure of souls which is void, but such a person as is *infra sacros Ordines*, or an Ordained Minister, and is also of the age of twenty three years; Nor is any Lay-person whatsoever to be presented unto any Benefice with Cure of Souls: But Spiritual and Ecclesiastical persons, (although that they be Aliens born) are Capable of Benefices with Cure within the Realm of *England*.

There was an Old Statute, That no Frenchman, although he was made a Denizon, should be presented unto any Church, or Benefice within the Realm of *England*. This Statute was made in the time of War betwixt the Realms of *England* and *France*; but that Statute is not now in force; But yet *V.* That if the King doth present any one to an avoidance, contrary to an express act of Parliament, his presentment is void, as it was adjudged, *Mic 8. Jac. in Co. B. in Waters Case.*

*V. St. 13. R. 2.
Rastek title,
France 1.*

*V. Stat 1 H. 5.
cap. 1.*

*Mic. 8 Jac Co.
B. Waters Case.*

A man was *Akte Natus*, born in Scotland before the Union of the two Realms: yet he was Capable to be presented unto a Benefice in England which was void, as it was adjudged, Mic. 8. Jac. in Co B. in Doctor *Seatons* Case: And so it was said it was if he was born in *Flowers*, Spain, or within any other Kingdom Friend, and in League with the King of England, he was Capable of a Benefice, or Ecclesiastical Dignity in England, as was the Bishop of *Spolettoes*, who was preferred to the Deanery of *Windsor*, and enjoyed the same; and it was said, that such Incumbent should maintain any Action real, personal, or mixt, for any thing concerning the Glebe or the possessions of the Church, as Prior Aliens might have done: for although he be an Alien born out of the Kings Dominions, yet he bringeth his Action not in his own right, but in the right of his Church, not in his natural, but in his politick capacity, and therefore the Action will lye.

If a Clerk be by the Patron presented to the Bishop to a Church which

Cook 1. part,
Instit. 120.
40. E. 3. 10.

which is void, and the Bishop doth refuse to admit or institute him to the Church or Benefice, the Bishop must shew the particular cause why he refuseth him; and he must not shew generally, That the Clark Presented unto him is unfit, incapable, criminal, or unable to serve the Cure, but must certifie the particular inability, crime or incapacity.

*Vide 38. E. 3.
2. in the Earl
of Arrundells
Case.*

A. seised of the Mannor of D. to which an Advowson was Appendant, the Church became void, and A. presented I. S. to the Bishop, Ordinary of the place, who refused to admit him into the Benefice; and thereupon A. brought a *Quare Impedit* against the Bishop, who pleaded, That upon his Examination of the said I. S. he found him to be *Schismaticum inveteratum*, and for that cause by the Laws of the Church to be *personam inhabilem & minime idoneam ad occupandum aliquod Beneficium cum cura animarum*; by reason whereof he refused for to admit him into the Benefice: In this case it was adjudged by the whole Court of Common Pleas, and afterwards affirmed upon a Writ of Error brought in

*Cook 5. part.
58 Spectem
Case.*

in the Kings Bench, That the plea of the Bishop was insufficient, because he shewed generally that he was *Schismaticus inveteratus*, which was altogether uncertain, and the especial crime or cause of his refusal ought to have been alledged by the Bishop, that the party might make answer thereunto, and so either Traverse the Cause, or take Issue thereupon.

p. Eliz. Dyer.
244.

In 9. Eliz. Dyer 254. The Bishop of *Normich* refused to admit a Clark who was presented unto him, because he was a common haunter of Taverns and a player at unlawful Games: And in that case it was adjudged, That they were no sufficient causes for his refusal; for although that they were offences which were prohibited by the Laws of the Realm, as to some persons, and at certain times, and so *Mala prohibita*; yet were they not crimes which were *Mala in se*, for which only a Clark ought to be refused, or to be deprived if he were admitted. And *vid.* 14. H. 4. 28. if the Patron Presenteth one, and the Bishop upon enquiry finds, That he hath a Plurality, that is no cause, for his

24. H. 4. 28.

his refusal of the Clark, because it is at the peril of the Incumbent himself if he keep the living two Moneths, that both his Benefices shall be void. But that is nothing as to the Bishop; but if the Clark Presented be Miscreant, Turk, Jew, Heretique, Schismaticque, Perjured person, Bastard, Villeine, Out-lawed, Illiterate, or a meer Lay-man, these are good causes for the Bishops refusal of him, so as the Bishop upon his refusal, did express the Crime, or the certain cause of his refusal, by a Certificate made by him: And note, That Mich. 7. Jacobi, in the Kings Bench in *Austyns* case, it was resolved by the whole Court, That whatsoever are sufficient causes of Deprivation of an Incumbent who is in the Church, the same are sufficient causes likewise for the Bishop or Ordinary, not to admit a Clark Presented to him to a Benefice. But if the Ordinary shall refuse the Clark presented unto him for any of the causes before alledged, he must give notice unto the Patron of such his cause of refusal of him, to the end that the Ordinary may Present another fit Clark unto the same Church;

14. H. 7. 12.

38. E. 3. 2.

5. H. 7. 19.

11. H. 7. 7.

22. H. 6. 16.

15. H. 7. 8.

12. Eliz.

Dyer. 293.

1. H. 7. 9.

25. Eliz.
Stat. 327.

Church; For if no notice be given; and the six Moneths pass, the Lapse shall not run to the Bishop or Ordinary, for that he shall not take advantage of his own wrong in not giving notice thereof to the Patron.

Thirdly, The Presentation or Nomination of the Clark to have the Benefice or Church which is void, must be unto the Bishop of the Diocess, who is the Supervisor, (and generally, or for the most part) is Visitor of all the Churches within his Diocess, for the better ordering and governing of the same: He is called Ordinary, because he hath Ordinary Jurisdiction in all Causes which are Ecclesiastical immediate to the King, for the doing of Justice within his Diocess, *in jure proprio, & non per Deputationem*: It is his care to see, That the Church be provided of an able and sufficient Curate, to officiate there, *Habet enim curam Curatorum*, to see that Divine Service be said, and to compell them to do it by Ecclesiastical Censures: And therefore all Presentations are made to the Bishop or Ordinary of the Diocess where

where the Church is void : But in the time of the vacancy of the Bishops See, or if the Bishop be *in remotis*, about the affairs of the King or State, then the Presentation must be made to the Guardian of the Spiritualities, (which commonly is his Dean and Chapter) or to the Vicar General which supplieth the room and place of the Bishop. And therefore *vid.* 22. H. 6. 29. by *Pafton* and *Afcough* Justices, it is said, That if a Bishop maketh a Guardian of the Spiritualities, and then goeth beyond Sea, for any the causes aforesaid, and the Patron doth Present his Clark to the Guardian of the Spiritualities, in the absence of the Bishop, and he refuseth to admit him into the Benefice or Church with Certificate of sufficient cause of such his refusal, that the Patron in such case may have and maintain a *Quare Impedit* against the said Guardian of the Spiritualities.

If a man doth recover and hath Judgement given for him, in a Writ of *Quare Impedit*, and afterwards the Bishop who is ordinary of the Diocess, dyeth before that the Clark
of

7. H. 4. 31.
17. E. 3. 23. b.
Fitz. N. B.
93. acc.

28. Eliz.
Dyer. 350.

38. E. 3. 12.

of the Plaintiff be admitted to the Benefice or Church, the Writ to admit the Clark of the Plaintiff must be directed unto the Guardian of the Spiritualties, *sede vacante*, to give admission: But if before the Writ of Admission to him directed be executed, another man be Created and Consecrated Bishop of that See, and Power of the Guardian of the Spiritualties doth then cease, and the party who recovered in the *Quare Impedit*, may have another Writ unto the Bishop to admit the Clark if he please: But see 38. E. 3. 12. That if the party taketh out in such case a Writ to the Metropolitan to admit his Clark, (where it should have been to the Guardian of the Spiritualties, or to the Vicar General) he cannot afterwards waive it, and have another Writ to the Vicar General, &c. but a *Sicut alias* to the Metropolitan.

As the Presentation, or the Presentment must be made unto the Bishop or Ordinary of that Diocess where the Church is void, or else unto his Guardian of the spiritualties, or Vicar General in all cases, as before is said, so also must it be made with-

in convenient time, to prevent a Lapse.

CHAP. XI.

Within what time a Presentation must be to avoid Lapse: And where Lapse shall incurre for want of Presentation within six Moneths. How the six Moneths shall be accounted; And who shall Present for Lapse.

THe Law hath appointed six Moneths to the Patron to Present his Clark unto the Bishop or Ordinary: But if the Patron doth not Present his Clark accordingly, then shall the Lapse run to the Bishop or Ordinary, and he shall Present for the default of the Patron, a Clark of his own choosing; and his Presentation is called in Law Collation. And if the Bishop or Ordinary shall surcease his time, and shall not Collate within the six Moneths to him allotted, then the Metropolitan, the Archbishop of the Province, shall Collate his Clark to the Church.

And

And if he also doth not Collate within other six Moneths, Then shall the King as Supream Ordinary of all the Diocesses and the Benefices in *England*, Present his Clark to the Church, being yet void: But there is notwithstanding great care to be had, and it is to be known, how, and after what manner the Church doth become void, for that accordingly the six Moneths shall be accompted.

If the Church shall become void by the Death of the Incumbent, then the six Moneths shall be accompted from the time of his Death; of which the Patron is at his peril to take notice, and to make his Presentment unto the Bishop or Ordinary accordingly; and so is the Law taken to be, if the Church doth become void by Creation, viz. by making the present Incumbent thereof a Bishop, or by Cession, whereof the Patron is at his peril likewise to take notice: But if the Church doth become void by Resignation (which is the act of the Incumbent himself, and which Resignation of necessity must be made to the Bishop or Ordinary) or by Deprivation, which is the

the act of the Law, there although the six Moneths do encurre before the Patron presents, yet the Bishop or Ordinary shall not Collate, unless the Bishop or Ordinary, upon the Resignation or Deprivation had given notice unto the Patron of such Avoydance of the Church: For in such and the like cases, the six Moneths shall be accounted from the time of the notice given to the Patron by the Bishop or Ordinary of the Resignation or Deprivation: But if the Church doth remain void by six Moneths after the death of the Incumbent, without any Presentation made to the same by the Patron; Or by six Moneths after such time that the Bishop or Ordinary hath in the case of Resignation or Deprivation given notice thereof unto the Patron, and the Bishop or Ordinary doth Collate his Clerk by reason of the Lapse devolved unto him, and before the Clerk be Inducted, the Patron doth present his Clerk to the Bishop, the Bishop may refuse to admit the Clerk of the Patron to the Church, for that the title to Collate was rightfully and lawfully come to

H the

Vid. 18 H. 7.
49. in Kello-
way.
5 E. 4. 3.

16 Eliz. Dyes?
327.
13 Eliz. Dyes
293.
1 H. 7 9.
50 E. 3. 3. acc.

23 H. 6. 26.
acc.

the Bishop. And note, That both for the notice, and to whom and where it is to be given; viz. that if the Patron doth Present his Clerk to the Bishop, and the Bishop doth refuse to admit his Clerk for any of the Causes before mentioned, That of such his refusal he is to give notice to the Patron himself if he be resident within the County where the Church is; but if he be not within the County, then the notice of such his refusal is to be left at the Church it self, as it was adjudged, Trinit. 27 Eliz. in Co. B. *Albany* and the Bishop of *St. Asaphs* case.

Vid. Albany and the Bishop of *St. Asaphs* Case.

Tr. 27 Eliz. C. B. Leon. 1. part, Reports, Sect. 39.

14 H. 7. 22.

If the Church be void, and the Patron doth Present his Clerk to the Ordinary, who refuseth to admit him untill he hath examined him of his ability; and a moneth or two after the Presentment, upon Examination the Clerk Presented is found to be criminous, or unable to serve the Cure, and afterwards Lapse encurreth, the six Moneths shall be accounted from the time of the Avoidance; and if the Patron be a Lay person, the Ordinary shall give notice unto him of the inability of the Clerk;

18 H. 7. 39.
in Kelloway:
5 E. 4. 4.
3 E. 4. 2.

Clerk; but otherwise it is if the Patron be a Spiritual person, and the Clerk be criminous or unable.

If the King be Patron, and doth not Present his Clerk to the Church within six Moneths, there the Ordinary ought not *de jure* to Collate in regard of the said Lapse: He onely ought for to sequester the profits of the Church till the King will Present. But in such case, if notwithstanding the Ordinary doth Collate his Clerk to the Church, and afterwards the King doth Present his Clerk to the Ordinary, the King in such case shall not remove and put out the Clerk Collated by the Ordinary, without a *Quare Impedit* first brought.

*Vid. 14 H. 7c
21. by Keble
Br. Title Pre-
sentment, 24c*

But in all cases before said, The six Moneths shall be accounted according to the Kalender, and not according to twenty eight dayes to the Moneth: For that the words (*Tempus semestre*) in the Statute of West. 2. cap. 5. shall have such construction as shall be for the relief of him who hath right, and to give him the longest time that may be, that he lose not his right. *Vid. to that pur-*

H 2

pose;

pose, Cook 6. part, *Catesbies* case; with which agreeth 5 E. 3. Rott. 100. Memb. clause in the Tower, which see vouch- ed in *Dickenson* and *Greenhams* case, in *Pophams Reports* 137.

14 H. 7. 21.
per Curiam.

If the King hath title to Present by Lapse, for the default of the Ordinary and Metropolitan, and notwithstanding the Kings title, the Patron doth present his Clerk, who is Admitted, Instituted and Inducted by the Metropolitan; this shall bind the King, and the King cannot remove the Incumbent without a *Quare Impedit* brought: For by the Induction the Church was full; and although the six Moneths were not incurred, and *Nullum tempus occurrit Regi*; yet in that case he shall not present or remove the Incumbent but by a *Quare Impedit* brought against him.

12 E. 3. Qua.
Imp. 159.

If a man be Tenant by the Curtesie of a Mannor to which an Advowson is Appendant, and the Church doth become void by Resignation, and then the Tenant by the curtesie dyeth, and the Mannor is seised into the Kings hand; in such case, although that the Heir be now of full age, yet the King shall

shall have the Presentment, as it was holden in 12 E. 3. *Fitz. Quare Imp.* 159.

If the Kings Tenant be seised of an Advowson and Presents, and afterwards the Church doth become void, and the Tenant dyeth, and the King seiseth the Advowson, if the Advowson did become void in the life of the Tenant, and six Moneths pass, and the Ordinary noth nor present for Lapse in the life of the Tenant, the King shall Present; for by the seizure he was seised, and then *Nullum Tempus occurrit Regi. Vid.* to that purpose 6 E. 2. *Fitz. Presentment* 9. 18 E. 3. 21.

18 E. 3. 21.

A man held Lands of the King, and a Mannor and Lands to which an Advowson was Appendant of a common person, and dyed, and the Advowsons were seised into the Kings hands, and afterwards the Church did become void; and after it was found, that the Tenant was but Tenant for life of the Advowson, and made Livery of the Lands *cum exitibus*; In that case it was holden by the whole Court; That by the Livery the Advowson did not pass out of

24 E. 3. 27.

27 E. 3. 81.

acc.

the King; And in that case the King had a Writ to the Bishop to admit his Clerk to the Church.

CHAP. XII.

Where the King may revoke or repeal his Presentation, where not: And where a Common person cannot revoke, or vary from his first Presentment.

39 H. 6. 19.
14 E. 4. 2.
20 H. 6. 19.

Y. 31 E. 3. Qu.
Imp. 185.
38 E. 3. 35.
17 Eliz. Dyer
348.
Y. Bacons
Maxims acc.

Y. 7 E. 32.
23 Eliz. Dyer.
360.
13 Eliz. Dyer.
293.
Cook 1. part.
Instit. 360.

IT hath been a Question much Controverted in old Books, Whether, if a Common person hath once presented his Clerk to the Ordinary, if he may Revoke the same, or Vary from his first Presentment? But the better opinion of the Books hath been, That a Common person cannot revoke or repeal, or vary from his first Presentment, because he hath put it out of himself, and hath given to the Bishop power to perfect what was by himself begun. But if the King do present to the Church, and his Clerk be admitted and instituted; yet the King may before Induction repeal, or revoke his first presentment, by his present-

presentment of another Clerk to the Bishop.

In 25 E. 3. 47. The Case was, the King brought a *Quare Impedit* against the Bishop of York of a Prebend in the Church of St. Peter in York; and shewed, that the Predecessor of the Bishop presented one N. and that afterwards the Predecessor dyed, and the Temporalities of the Bishoprick came to the Kings hand, and they being in his hand, the Prebend became void by the death of N. The Bishop said, That after the death of N. the King presented *Robert de Kelsey* to the Prebend, who was admitted and installed by the Dean and Chapter: Which Presentment of *Robert* was Ratified and Confirmed to the said *Robert*; and shewed the Deed of Confirmation thereof, and shewed further, That the said *Robert* dyed Prebendary: and so demanded Judgement, if the King should have the Presentment. To which it was said for the King, That before *Robert de Kelsey* was admitted to the Prebend, the King did repeal the Presentment made of the said *Robert*; and shewed forth the Deed

Tr. 25 E. 3.
47. *Robert de Kelseys Case.*

24 E. 3. acc.

7 H. 4. 13.

of Repeal, and the Certificate of the Chapter of the day thereof. It was adjudged in this Case, That by the Repeal, the first presentment of *Robert de Kelsey* was utterly void, so as the King had title to present, and Judgement was given against the Bishop. Note, That I do observe out of that Case, wherewith agreeth the Book of 14 E. 3. That it must appear by Deed or other wayes to the Court, that the King did repeal his presentment: that otherwise the pleading of the repeal is not good; and to that purpose, *Vid.* 7 H. 4. 13. In a *Quare Impedit* brought by the King, the Incumbent pleaded the Ratification of him Incumbent under the Kings Privy Seal; To which it was answered, That the same was repealed; but it was not shewed how it was repealed by Deed or otherwise; and therefore it was doubted if the pleading thereof was good or not. But note, That at this day it is holden, That the very presentment of another Clerk by the King before Induction, without any more signification, or Act done, is accounted in Law to be a repeal

repeal of the first presentment: and so was it adjudged. Mic. 8. Jac. in *Mic. 8. Ia. C. B. Walters Case.*
Co. B. in *Walters Case.*

The Vicarige of *Tatton* in the Countrey of *Southampton* came unto the Queen by Lapse: the Ordinary of the Diocesis Collated A. to the Vicarige; afterwards the Queen presented B. who thereupon brought a *Quare Impedit* against the Bishop and the Incumbent, depending which *Quare Impedit* A. by Covin and fraud obtained. a new presentation to the same from the Queen, without making mention of the pleasure of the Queen to repeal or to revoke her first presentment: In this Case, it was holden by the whole Court, That the second presentation in it self had been sufficient, and had been a repeal of the first, if it had not been obtained by the fraud and covin of A. And so it was adjudged in the Court of Common Pleas, Mic. 4. Jac. in the Bishop of *Bangor*, and *Williams Case.*

40. Jac. Bishop of *Bangor* and *Williams Case.*

If the King hath Cause for to present by reason of Lapse, or otherwise, and presents I. S. to the Bishop; and before he is Instituted and

Mic. 8. 1a. C. B.
Calvert and
Kitchyns Case.

44. E. 3. 31. b.
acc.

V. 16. Eliz.
Dyer. 327. acc.

and Inducted, the King dyes, and the Successor King without reciting or mentioning of the presentment of his Predecessor, presents I. D. to the same Church: It was in that Case (amongst other points) adjudged. Mic. 8. Jac. in the Exchequer in *Calvert* and *Kitchyns* Case, that the very decease of the King did determine the first Presentation: For that the Presentation was but a power given to the Ordinary, which was Countermendable, and revokable; and by the presentment of him, I. S. had *neque Officium, neque Beneficium*: and further in that Case it was Resolved, That the first presentation was repealed, although it was not recited by the King: and was not within the Statute of 6. H. 8. cap. 15. That the King ought to recite the same: For it was agreed by the Justices, That that Statute went and extended only to Leases, and did not extend to Presentations to Churches, or other Spiritual promotions.

CHAP. XIII.

Of Examination of the Clerk by the Ordinary: Of Admission and Institution, at what time and place the same may be; where the Ordinary may refuse to admit the Clerk, because the Church is Litigious; and where Jure Patronatus shall be awarded: where there shall be a Plenarty by Institution. And how Plenarty and Avoidance shall be tryed.

WHen the Patron upon the Avoidance hath presented his Clerk within six Moneths, which is the time limited by the Law, the Bishop or Ordinary is to admit and Institute the Clerk presented to the Church: But before he be admitted into the same, the Bishop or Ordinary ought for to examine him of his Ability. For if upon Examination the Clerk presented, be found to be unable to serve the Cure, or that he be criminous, as before is said, then may the Ordinary

14. H. 7. 22.

40. E. 3. Qu.
Imp. 128.

dinary or Bishop refuse to admit such Clerk to the Church: But yet *vide* 40. E. 3. Qu. Imp. 128. If the Clerk be not of ability at the time of the refusal of him by the Bishop: Or if issue shall be taken upon his Ability: If the Bishop after such Issue joyned, doth institute him to the Benefice or Church, he shall be adjudged to have been alwayes of Ability, and the first presentation of him shall stand and be good, and he shall not need to have a New Presentation.

22. H. 6. 29.
acc.

15 H. 7. 7.
Mic. 15. Eliz.
in Co. B. ad-
judged. acc.

This Examination of the Clerk is to be done by the Bishop or Ordinary at a convenient time within the six moneths after the Clerk is presented unto him; For the Ordinary cannot refuse to examine the Clerk during all the six Moneths, and by reason thereof suffer a Lapse to run to himself; For if he should so do, the Patron might lose his presentment, and the Ordinary shall take advantage of his own wrong in his not examining of the Clerk within convenient time: But if the Ordinary (when the Clerk comes to be examined) *sedet circa Curam Pastoralem,*

Pastoralem, the Ordinary is not bounden to leave the Business in hand, and presently examine the Clerk, but to make an end of his other business first, and then to examine the Clerk: And the Ordinary may appoint a convenient time and place for the Clerk for to attend for the examining of him.

In a *Quare Impedit* brought by *Tr. 33. Eliz.*
Palmes against the Bishop of *Peter-*
borough, for not admitting his Clerk *B. R. Palmes*
to the Church, the Bishop pleaded, and Bishop of
that he demanded of the Clerk the *Peterboroughs*
Presentee of the Plaintiff, to see *Cafe. Vid. Cro.*
his Letters of Orders, and he would *3. part, 241.*
not shew them unto him, and this
he did, because he was not ascertain-
ed whether he was a Deacon or not;
and he also demanded of him Let-
ters Missive, or Testimonials testify-
ing his Ability; and because he
had not his Letters of Orders, nor
Letters Missive, nor made proof of
them to the Bishop, he desired leave
of the Bishop to bring them, who
gave him a Weeks time, but the
Clerk came not again, so the six
moneths passed, and the Bishop Col-
lated for a Lapse: upon this plea

of

of the Bishop it was demurred in Law, and it was adjudged for the Plaintiff against the Bishop; For it was said by the Court, that these were not Causes to stay the Admittance, and that the Clerk is not bounden to shew his Letters of Orders, or Missive to the Bishop, but the Bishop is to go to the Examination of him without his shewing of them.

If the Bishop upon Examination of the Clerk presented, find him to be of Ability to serve the Cure, and to be capable of the Benefice: then doth he admit him to the same, in these or the like words, *viz. Admitto te Habilem*: and afterwards he doth Institute him unto the Benefice or Church, and giveth him his charge thereof in these or the like words, *viz. Instituto te Rectorem Ecclesiæ Parochialis de D. & habere curam animarum, & Accipe Curam tuam, & meam. Vide 32. H. 6. 28.* Where it is said, A man may be a Parson of a Church without his knowledge: For if the Bishop say to another, *Admitto te ad tale Beneficium nomine A. B.* this admission is an Institution of him,

Co. 4. part. 79.
32. H. 6. 28. b.
33 H. 6. 24.
acc.

It is not material, Whether the Examination, Admission, or Institution be made by the Bishop within his own Diocess or not; For the Bishops Jurisdiction, to such and the like purposes, is not Local, but followeth the person of the Bishop: And therefore if a Clerk be presented to the Bishop of *Normich*, to a Church which is void within his Diocess of *Normich*, although that the Bishop be in *London*, or in any other place out of his own Diocess; yet he may there Examine that Clerk and give admission unto him; for that the Jurisdiction of Bishops, as to the making of Clerks, admitting of them, the granting of Administrations, and the like, is not Local, but followeth the person of the Bishop wheresoever he is, as it was adjudged; Pasc. 27. Eliz. in Co. B. in *Carter and Trofts Case*.

Pasc. 27. Jac. in
Co. B. *Kiddys*
and *Dobbins*
Case adjudg-
ed. acc.

If two Joint-tenants, or Tenants in Common be of the Patronage, and they cannot agree in their presentment, but vary and present several men to the Bishop; in such Case the Bishop is not bounden to admit any of their Clerks; and if

45. E. 3. tit.
Present. 8. Dr.
& Student. 116.
acc.

the

the six moneths do incurr before they agree, the Bishop may Collate a Clerk of his own to the Church: but he cannot Collate within the six moneths; For if he do, they may agree and bring a *Quare impedit* and remove the Incumbent, for that his

34 H. 6. 46.

5 H. 7. 8.

11. H. 4. 58.

33. H. 6. 32.

21. H. 6. 45.

by *Ascough*.

20. E. 3. Qu.

Imp. 63.

Collation was a disturbance. But if there be two Coparceners, and the Church doth become void; and the eldest Sister doth present, the Bishop is bounden to admit her Clerk: for that by the Law the eldest Sister shall have the first presentment, unless there be an agreement made betwixt them to present in some other manner. And *vide* 22 E. 4. 9. So it is, That the Husband who is Tenant by the Curtesie in the Right of the Eldest Sister shall first present.

If two men present one man severally to the Bishop, the Bishop cannot admit him generally to the Church: But the Bishop in the Admittance of the Clerk to be Incumbent, must admit him as Clerk and Incumbent of the presentation of one of them: as it was Resolved, Mic. 8. Jac. in the Common Pleas

in

in *Danby* and *Lindleys Case*: And if they make such Presentation, claiming by several Patrons; or titles; The Bishop is to direct the Writ *de jure Patronatus*, which is in the nature of a Commission, (and may issue forth as well after the several Presentments as before) because the Church is Litigious: But the Bishop is not to award the *jure Patronatus* but at the request and prayer of the parties. But yet it seemeth by the books of 5 H. 7. 22. and by *Brian*, 34 H. 6. 38. that the *jure Patronatus* must be sued forth at the cost and charge of the Bishop, because it is for his Excuse, and so for his Advantage.

21 H. 6. 44. a.

7 E. 4. Qu.
Imp. 100. Dr.
& Stud. 119.

In 26 Eliz. in the Common Pleas in a Prohibition, the Case was, *Gerard* Master of the Rolls, Presented *Chatterton* Bishop of *Chester* to the Church of *Bangor*, to which Church one J. S. also Presented his Clerk; by which severall Presentments the Church became Litigious; the Archbishop of *York* being Ordinary of the place, awarded *jure Patronatus*; depending which, the said Archbishop admitted *Chatterton* to the Church: J. S. thereupon libelled in the Spiritual

Pasch. 26 El.
in Co. B. *Gerard*
and *Chambers*
Case.
V. Leon. 3. part.
Reports 98.

tual Court against the Archbishop, for that he the said Archbishop *prædicto Episcopo plus æquo fidens admisit dictum Episcopum pendente jure Patronatus*; and now came the Archbishop and prayed a Prohibition, which was granted by the Court: For in this Case it was said by the Court, That the awarding of the *jure Patronatus* is not a thing of necessity, but at the will of the Ordinary, and for his better Instruction: For it he will at his peril take notice of the right of the Patronage, he may receive which of the Clerks he will, without a *jure Patronatus*.

Dr. & Stud.
117.

33 H. 6. 32.

22 E. 4. 4.

vid. Plow.
Com. 528.

But if two Coparceners be of an Advowson, and the Church void, and they severally Present to the Ordinary, this doth not make the Church to be Litigious, because they claim by one title. And so it is, if they make composition to present by turns, and one of them doth usurp in the turn of the other, such usurpation doth not put the other out of possession.

By Institution made by the Bishop, the Church is full of an Incumbent as to the Spiritualities; that is to say,

to Celebrate Divine Service, to Administer the Sacraments, to Preach and instruct the Parishioners in the true Faith, &c. and in a *Quare Impedit* brought, Plenarry by Institution is a good plea against a common person, and yet the Incumbent wanteth the Temporalities by which he should live, which he hath not before he be Inducted; for upon the Induction, the Temporalities, viz. the Gleab, Offerings and Tythes are vested actually in him.

38 E. 3. 4.

In an *Ejectione firma* by the Lessee of R. Incumbent of the Church of D. the Case was, That the King was the true Patron; and one W. entered a *Caveat in vita Incumbentis*, who then lay sick *in extremis*, in this manner, viz. *Caveat Episcopus ne quis admittatur, &c. nisi Convocatus*; the said W. the Incumbent dyed, N. a stranger presented one M. who was admitted, instituted and inducted; Afterwards W. Presented one G. who was instituted and inducted; Afterwards R. procured a Presentation from the King, who was instituted and inducted: It came in Question in the Spiritual Court, Who had the

Mich. 15 Jac.
in B. R. *Rones*
Case. *Pophams*
Reports 133.

best Right ? It was the opinion there, That the first institution was *irrita & vacua*, by reason of the Caveat ; and then, the Church being full of the second institution, the Presentment of the King was void. But in this Case, it was Resolved by all the Justices of the Court of Common Pleas, 1. That this Caveat was void, because it was in the life of the Incumbent. 2. That the Church upon the institution of M. was full against all but the King : and then the Presentation of G. was void, by reason of the super-institution ; and no obstacle was to hinder the Presentation of R. the Kings Presentee, and that the said R. had the best Right.

Cook 4. part,
77. in Digbies
Case.

If a Clerk be admitted and instituted into a Benefice with Cure of Souls, of the clear yearly value of 8 l. *per an.* and before he be inducted he accepteth of another Benefice with Cure of Souls, and is inducted into the same, the first Benefice is become void by the Statute of 21 H. 8. of Pluralities ; For in Judgement of the Common Law, he that is instituted into a Benefice, hath accepted of the

the same, and the Church is full within the intent of that Statute without induction; and yet the incumbent is not so absolutely Parson by the Institution, that he can then charge the Church to bind the Successor before induction. And therefore, if a Prebendary, Parson, or Vicar, after he be admitted and instituted, and before he be inducted, grants an Annuity out of the Prebend, Parsonage or Vicarage, and the same be confirmed by the Patron and Ordinary, or by the Dean and Chapter: yet this shall not charge the Gleab, or the Successor of the Prebendary or Parson: for although by the institution he hath *jus ad rem*, yet he hath not *jus in re*, but the Charge in such Case shall lie upon the Parson, and not upon the Lands.

At the Common Law, if a Stranger had presented his Clerk to the Bishop, and he had been admitted and instituted to the Church whereof a Common person was the Patron, the Patron had no remedy for to recover his Presentment, or Advowson, but by a Writ of Right of Advowson,

Cook 2. part.
Instit. 344.

son, by which the Incumbent was not to be removed; and so it was, if an Usurpation had been upon an *Infant* or a *Feme Covert* who had an Advowson by Discent, Plenarty generally was a good plea against them, and the reason thereof was, that the Incumbent might quietly intend and apply himself to his Spiritual charge, and also for that the Law intended, that the Bishop who had Cure of the Souls within his Diocess, would admit and institute an able man for the Officiating of the Cure, and the Discharge as well of the Bishops duty, as of his own. But yet at the Common Law, if one had usurped upon the King, and his Clerk had been admitted, instituted and inducted, the King might have removed him by a *Quare Impedit*, and been restored to his Presentation, by reason of his Prerogative, That *Nullum tempus occurrit Regi*; but he could not have presented, neither could have removed the Incumbent any way but by Action. But this mischief was remedied by the Statute of *Westm. 2. cap. 5.* which gave the *Quare Impedit* to the party notwithstanding such Plenarty, *dum-*
modo

modo Breve infra tempus semestre impetretur. And at this day the Church is not full by institution against the King: For (as I said before) the King at this day before induction, may Repeal and Revoke his former Presentation, which he could not do if the Church was full of an Incumbent, as it was adjudged, 18 Eliz. in *Giles Case*; which Case is vouched in *Cook* 10 part, 133. in *Holts Case*.

45 E. 3. 39.
18 Eliz. Dyer
348.
25 E. 3. 47.
33 H. 6. 24. a.
18 Eliz. in
Co. B. *Giles*
Case.

24 E. 3. 31. In a *Quare Impedit* brought by the King against the Bishop of *Winton* and B. the Case was, The Bishop did present A. to the Church, who was inducted; Afterwards A. accepted of a Plurality, by which the Church became void; and afterwards the Bishop presented B. to the Church, who was instituted and inducted; the King brought a *Quare Impedit* against the Bishop, and B. and Recovered, and had a Writ to the Bishop to admit his Clerk.

24 E. 3. 31.

If the Bishop Collate to a Church, and before induction of the Clerk, the Bishop dyeth, and the Temporalities of the Bishop are seized into the

Kings hands, the King shall Present to the Avoydance, because the Church was not full against the King till induction.

V. 5 El. Dyer

317.

21 *Eli. Dyer.*

317.

50 *E. 3. 17.*

& 18.

22 *E. 3. 10.*

V. 39 E. 3. 2.

If Ability of the Clerk who is dead, comes in question; and Issue be signed upon it, it shall be tryed by Jury in the County where the examination was.

This Plenarty is a Spiritual thing, and therefore, if it come in Question, Whether the Church be full of an Incumbent or not, the same shall be tryed by the Certificate of the Bishop, who best knowes of the Institution: But if the Issue to be tryed be, Whether the Church be void or not, the same shall be tryed by a Jury at the Common Law, unless the Issue to be tryed, be upon some special act of Avoydance; for then, the same shall be tryed by the Certificate of the Bishop, so as the especial Cause of Avoydance, be Spiritual.

CHAR.

CHAP. XIV.

Of Induction; By whom the same is to be done. How far the Parson, or Vicar upon their Inductions, may charge the Gleab: What Actions they may have for their Possessions after their Induction: And of their Payment of first fruits.

THe last thing for the making of the Clark presented, com-
pleat incumbent of the Church, is
Induction; This is usually done by
the Arch-Deacon; but may be done
by the Bishop himself: which is no-
thing else, but the putting of the
Clark in possession of the Church
Gleabe Lands, Tythes, Offerings,
and other the Temporalities of the
Church.

11 H. 4. 76. b.
14 H. 6. Qu.
Imp. 162.
11 H. 4. 9.
38 H. 6. 15.
acc.

If the Archdeacon will not induct
the Clark after such time as the
Bishop hath admitted and instituted
him, and directed his Letters to the
Archdeacon to induct him; By the
opinion of Mr. Fitzherbert, an Acti-
on upon the Case will lie against
the

17 F.N.B. 47.
h.
26 H. 8. 3. by
Knightly.
F.N.B. 36. p.

the Archdeacon, because that the Induction is a Temporal act: But others are of opinion, and so likewise it was adjudged, Pasc. 33. Eliz. in Co. B. That a Citation shall be awarded out of the Spiritual Court against the Archdeacon, and he shall be punished there, because that the Archdeacon may alledge some special cause, for which, by the Ecclesiastical Law the Clark he ought not to be inducted, which cause may not be determined elsewhere, but only in the Spiritual Court.

38. E. 3. Qu.
Imp. 135.

33. H. 6. 24. 3.

In 38. E. 3. Qu. Imp. 135. it is said, that he is not Parson *in facto* until induction: and therefore it is said there, that if a Writ of Right of Advowson be brought, the Plaintiff ought to Count that the party was inducted; But by the induction of him, publick Notice is given to the Parishioners, that he is their Parson or Vicar who hath the Cure of their Souls: And this is also manifest unto them by his Actions, viz. his entering into, and taking of the possession of the Church, Ringing of his Bells, &c.

4. H. 8. Dyer. 1.

After he is inducted, he may by the

the Statute of 25. E. 3. cap. 7. plead any plea in barr in a *Quare Impedit* brought against him as possessor of the Church; As if a *Quare Impedit* be brought against him, he may plead a Release in barr, because he hath the Freehold of the Church and of the Gleab in him, which shall not be lost without his Answer: And after he is inducted, he may maintain any Action Real, Personal, or mixt, for the Gleab, or any thing concerning the possessions; as if a Parson maketh a Lease for life of his Gleab, he shall maintain a Writ *de Consimili Casu* during the life of the Lessee; and a Writ of *Entre ad Terminum quem præterit* after the death of the Lessee: so may he have an Action of Waste, for Waste done on the Gleab Lands: But a Writ of Right for Disclaimer, A Writ of Customes and Services, a Writ of *Ne injuste vexes*, or other Writs which are grounded upon the meer Right, he shall not have, because that the absolute Inheritance of the Gleab, &c. is not in him: and so he may have and maintain any Action, Suit, or Libel which are personal for

8.H.5.9.ass.

Fitz.N.B.49:
L.Cook 1. part.
Instit. 341.2. E. 4. 3:
10. H. 7. 5.

for the Tythes, or other profits of the Church detained or withholden from him in his own Name, which he could not have had, sued, or maintained before he was inducted.

17. 36. H. 8.
Dyer in *Taverners*. Case.
19. H. 6. &
21. H. 7. acc.

Cook 1. part,
Instit. 96. pl.
136. 2.

If a Parson, or Vicar who is inducted and compleat, make a Lease of his Gleab and Tythes by Deed, (as the same must so be) for years, the Lease is good. Yet in such Case the Parson or Vicar himself must Officiate and Serve the Cure, and not the Lessee: For that the Cure being a Spiritual Charge, and Administration doth not follow the Gleab or Tythes, but is annexed inseparably to the person of him who is incumbent of the Church.

After that the Clark is inducted by the Archdeacon, (or other who hath power to do the same,) He must Compound for the first Fruits with the King, before that he can take any of the profits of the Benefice. For if he taketh any profits before he make Composition with the King for the first fruits, he shall pay double fruits. And for the payment of the first fruits, he must be bound in a penal Obligation with Sureties,

of Sureties, and upon the payment thereof, he shall have of the Officer of Receiver of the first fruits, a Bill, testifying the Receipt thereof; and the Obligation shall be delivered up to him again.

CHAP. XV.

By what Acts the Church may become void, and the Incumbent removed. And of Avoidance by Death: and Entry into Religion.

I Having settled the Clark presented, a perfect Incumbent in his Spiritual Benefice with Cure of Souls, and in the possession of the Church, and having given him some power therein and thereof: Let us now see by what, and by whose acts the Church may become void, and the Clark presented may be removed and put out of his Benefice again.

The Church may become void by several Means, and Laws, viz. either by the Ecclesiastical and Spiritual Law;

Law ; or else by Positive or Statute Law. And in some cases the Church shall become void by the meer Act of Law : In some cases by the Act of the party incumbent, and in some case by a Sentence given in the Spiritual Court, grounded upon the Act or defect of the party.

In all Cases, the death of the Incumbent is a present Avoydance of the Church, and therefore if the Incumbent thereof dyeth, the Church is presently void ; and the Patron at his peril ought to take notice of the Avoidance , and present another Clark to the Bishop or Ordinary to be instituted into the Benefice within six moneths without any Notice to be given unto him of the Incumbents death, otherwise the Lapse shall encur to the Ordinary, as before is said.

Cook 1. parts
Instit. 132.

There is a Natural death, a Death *de facto* ; and there is a Civil death, a Death in Law. As the Natural death maketh a present Avoydance of the Church *de facto* : So the Civil Death doth make the Church void *de jure*, though not *de facto*.

If a man had entered into Religion,

on, and been Professed (*renunciavit omnibus quæ seculi sunt*) and he was Civilly dead in Law, so as his Profession were in some house of Religion within the Realm, (for of Forrein Professions, the Laws and Judges of the Realm of *England* did not take knowledge) and by such Profession in Religion the Church had become void, whereof he was Incumbent before; Yet might the King being *persona mixta*, and having both Jurisdictions, as well the Ecclesiastical as the Civil, have dispensed with such a Parson, or Vicar, that he might have holden all the Benefices that he had, notwithstanding his Profession in Religion: and the Patron had no Remedy for such an Avoydance, for that the Church was not void *de facto*, but *de jure* only by the Profession: But in such case, if the Profession had been certified by the Ordinary, and no Licence or Dispensation had been obtained from the King, to hold his Benefice, then this Civil Death by the Ecclesiastical Law had been an Avoydance of the Church, of which the Patron might have taken advantage, and have

have presented another Clark unto the Bishop or Ordinary to be inducted into the same.

By the Ecclesiastical and Spiritual Law the Church may become void divers wayes : as 1. By Cession 2. Deprivation : 3. By Resignation. 4. By Creation. Of all which in several Chapters after very bric fly.

CHAP. XVI.

Of Avoidance by Cession ; what Cession is ; And where upon Cession the Church is void, without Notice ; where not.

BY a Canon made in the Council of Lateran, holden under Pope Innocent the third; A. 1215. it is ordained, *Quod quicumq; recipit aliud quod Beneficium cum Cura animarum, si prius tale Beneficium obtinebit, sit eo jure ipso privatus ; Et si forte illud retinere contenderit, alio sit spoliatus : is quoq; ad quem spectat prioris Donatio, illud post receptionem alterius conferat cui merito viderit conferendum.*

ferendum. This Decree or Canon is general. And if a Parson, or Vicar that had one Benefice with Cure of Souls, had taken another Benefice without Licence or Dispensation, the same had been an Avoydance of the first Benefice, called Cession of the first Benefice by the said Canon, without any Sentence Declaratory to have made the Church void.

24 E. 3. 30.
24 E. 3. 26. B.
acc.
F.N. B. 34. L.

Pasc. 31. Eliz.
B.R. *Underhill*
and *Savages*
case. Leon. 11
Rep. 316.

In 31. Eliz. in the Kings Bench, the Case between *Underhill* and *Savage* was this; *Savage* was presented to a Benefice; and afterwards he was presented to another, and then purchased a Dispensation, and was Qualified, and afterwards he accepted of the Archdeaconry of *Glocester*; In this Case two points were resolved, I. That by acceptance of a second Benefice, the first Benefice was void by Cession, without any Sentence Declaratory by the Statute of 21 H. 8. cap. 13. 2. That if one hath a Benefice with Cure of Souls, and he accepts of an Archdeaconry, that the same was not a Benefice with Cure of Souls within the said Statute, as to make his first Benefice void.

And although by Cession the
K Church

Cook 4. part,
77. in *Hollands*
case.

4 E. 3. 9. Qu.
1 imp. 35.
24 E. 3. 38.

Church was said to be void, yet by such Cession it was not so absolutely void *de facto*, that the Lapse should have incurred against the Patron if he had not presented another Clark unto the Church within six moneths, unless notice had been given to the Patron by the Ordinary of the said Cession. So if the Incumbent of a Parsonage or Vicarige with Cure, had been made Dean of a Cathedral Church, his first Parsonage or Vicarige had been void by Cession by the Ecclesiastical Law, and by the said Canon, because that the Dignity and the Benefice were not compatible; And the Statute of 21 H. 8. cap. 13. is but an affirmation of the Ecclesiastical Law, and of the said Canon as to this point: But the King might have dispensed with the said Canon, and might have enabled any Parson or Vicar to have holden two Benefices with Cure of Souls, notwithstanding the said Canon made in the Court of *Rome*: For notwithstanding that divers Ecclesiastical Laws and Canons were first made in the Court of *Rome*: yet afterwards they being used and confirmed within this Realm, they

they by acceptance and usage became the Ecclesiastical Laws of this Realm: & therefore although the said Canon which maketh the taking of a second Benefice to be a Cession of the first, was made and devised in the Court of *Rome*, & notwithstanding that they yet might have dispenced with the said Canon, (and so did) in many Cases: Yet it is adjudged 9. E. 4. 44. in the Case of the Prior of *Oxgate*, that by force of that Canon, and so by the Ecclesiastical Laws of the Realm, by the taking of a second Benefice, the first Benefice became void by Cession.

If any one presenteth himself to a Church, who hath a former Benefice with Cure; this is a Cession by the Ecclesiastical Laws of the Realm: But the Courts and Judges of the Common Law are not to take notice of such Cession, untill the same be certified unto them from the Ecclesiastical Court by the Ordinary.

*Vid. 14 H. 6.
17. acc.*

CHAP. XVII.

Of Avoydance by Deprivation; what are Causes of Deprivation in the Spiritual Court approved by the Common Law. Where upon such Avoydance Notice must be given to the Patron by the Ordinary: Where not.

THe second means of Avoydance of the Church, or Benefice with Cure, is Deprivation, which although it be the Act of Law in the Spiritual Court: yet it is grounded upon some act or defect of the party deprived, and is the Discharge of the Incumbent of the Officiating of his Cure or Benefice by a Sentence Declaratory in the Spiritual and Ecclesiastical Court, upon a sufficient Cause proved in the same Court against him.

Causes of Deprivation in the Spiritual Court (all which are allowed of by the Common Law) are, *Conscientia Criminis; Debilitas Corporis; Defectus Scientia; Malitia Plebis; Grave*

Grave Scandalum; Irregularitas personæ: Heresie, Schism, and many others.

In 5 R. 2. A Cardinal was Col-
lated by the Bishop of *Durham* unto
a Benefice with Cure, the Bishop
dyed, and the Temporalities of his
Bishoprick being in the Kings hand,
the King brought a *Quare Impedit*,
and shewed that the said Cardinal
was Miscreant, and deprived for
Miscreancy in the Court of *Rome*:
In that case it was adjudged, that it
was a good cause of Deprivation of
him; And there *Belknap* one of the
Judges, swore the Law to be, That
if a man for adhering unto the Kings
Enemies, shall forfeit his Lands for
such his adherence, and the King
shall have the Escheate of them, be-
cause he is out of the Faith of his
Leige Lord, the King; *à fortiori*,
he shall forfeit his Living, who is out
of the Faith of God: And it was in
that case further agreed, That al-
though the said Cardinal was de-
prived in the Court of *Rome*; yet
whether he was Miscreant, or not
Miscreant, should be tryed here in
England where the Church was,
K 3 by

V. 5. R. 2. tit.
Tryal 54.

33. E. 3. 2. & 3.

by the Bishop of the Diocess there.
 If the Clerk presented be Perjured, and be thereof convicted or attainted in the Spiritual Court upon proceedings of their Law there, or by his own confession, the same is a good cause there for to deprive him of his Benefice; But the Patron of this Deprivation must have Notice given by the Ordinary: and so it is if the Clark presented, be Irreligious, Illiterate, Bastard, Villein, or a meer Lay-man, who hath not taken Orders from the Bishop.

V. 5. H. 7. 14:
 acc:

If a Parson of a Church be convicted at the Common Law of Manslaughter, and prayeth his Clergy, and hath it granted unto him: yet the same is a good and sufficient cause for them in the Spiritual Court for to deprive him of his Benefice, as it was adjudged, Tr. 15. Eliz. in the Kings Bench in *Searles* case.

V. 19. Eliz.
 Dyer. 353.
 Blowers Case.

If the Patron presenteth to the Bishop a Lay-man under the age of 23. years, who is admitted, Instituted and Inducted into the Church: and after he is sued in the Spiritual Court by a stranger to be deprived for

for his said Incapacity, and afterwards a *Quare Impedit* is brought against the Ordinary, and the Incumbent; and Judgement therein is given ^{27 H. 6. 5. acc.} against the Incumbent for his default at the Grand Distress, as it may be, and afterwards the first Incumbent by sentence pronounced in the Spiritual Court at the strangers suit there is deprived; This Deprivation of him is good, although that he was before removed out of his Benefice upon the Judgement given against him in the *Quare Impedit*; But if the Incumbent doth afterwards bring a Writ of Disceit upon the Judgement given in the *Quare Impedit* by default, for that he was not summoned, He shall have Judgement thereupon, and the Deprivation in the Spiritual Court shall be no Impediment unto him, for that in the *Quare Impedit* the Incumbency was not in question; and he shall be restored to what he lost.

If the Patron presenteth a meer Lay-man, the same is a good cause of Deprivation of him, if he be instituted and Inducted; But af-

13 El. Dyer.
292. acc.

ter such Institution and Induction, he is Incumbent *de facto*, and he ought to be deprived by a Sentence in the Spiritual Court; and of such Deprivation, the Ordinary must give Notice to the Patron: But if the Patron doth present a meer Layman, and the Ordinary doth refuse to admit him, there the Ordinary needs not to give Notice to the Patron of it, for that it is notorious that he is incapable.

29.E.3.16.
20.H.6.46.

3.H.4.3. by
Birwit.
Co. 11.pt.72.

Cook 11.part,
40. in Lyfords
Case.

Mic. 12. Ise.
B.R. the Bi-
shop of Salis-
buries Case.

9 E.4.34.2.

In ancient times, if a man had been a Dilapidator of his Church, he might have been deprived for the same cause; as if a Bishop, a Prebendary, or a Parson had committed Waste in the destroying and cutting down of all the Timber Trees, or Woods, that were standing or growing upon the Lands, or had pulled down the houses belonging unto, or parcel of his Bishoprick, Prebend, or Parsonage, he might have been deposed, and deprived of his Spiritual Living in such Cases; and so it was adjudged, Mic. 12. Jacob. in the Kings Bench in the Bishop of Salis'buries Case. And so it was, if a Parson, Vicar, or other Ecclesiastical

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cal person seized in the Right of the Church, had aliened in the Lands of the Church, he might have been ^{20 H. 6. 48.} deprived for the same cause: But I ^{by Ascough,} conceive, that the same doth not hold to be Law at this day. But *Quere* of it.

In the time of Queen *Mary*, for a Priest to have been married, had been ^{4. Ma. Dyer,} a good cause for to have Deprived ^{133.} him of his Benefice in the Spiritual Court. and many Presidents there are thereof; but the same is not so now.

An Incumbent was admitted, In- ^{Cook 3. part,} stituted and Inducted into a Benefice ^{102. Winfords} with Cure of Souls, in the time of ^{Case.} King *Edward* the sixth; and afterwards, in the time of Queen *Mary* he was deprived, because he was a married man, and a favourer of the Religion in the time of King *Edward* the sixth, and the Church being void by this said Deprivation, another man was Instituted and Inducted into the same Church: and afterwards in the time of Queen *Elizabeth* the Last Clark presented was deprived, and the first Sentence of Deprivation in the time of Queen *Mary*,

Mary adjudged and declared to be void, and the first Incumbent restored to the Benefice. It was adjudged in that case, that the Deprivation of the first Incumbent in the Spiritual Court was good, and stood good, untill that afterwards the same was declared to be void and untill then the second Clark presented was Lawfull Incumbent: But when the sentence of Repeal came, and made void the first Deprivation, then was the first Incumbent in the Church again of his first Presentation, Institution and Induction, and needed not any new Institution and Induction to the Church.

39 H. 6. 19.
acc.

In 39. H. 6. 19. in a *Quare Impedit* the Plaintiff counted that the Church was void by the Deprivation of I. S. who was incumbent of the same; The Defendant shewed, that he had sued forth a Repeal of the said Sentence of Deprivation; but because he did not plead the certainty of the same, how and in what manner it was, the plea of the Defendant was disallowed by the Court: Out of which case it is clearly to be gathered, the Deprivation

tion stood, and I. S. was not Incumbent of the Church.

There are many other Causes of Deprivation of the Incumbent, which at this day are allowed and approved of by the Common Laws of the Realm, as good Causes of Deprivation in the Spiritual Court, viz. Disobedience to the Ordinary, Incontinency, Drunkenness, &c. Or if a Parson, or a Vicar had remained Excommunicated by the space of forty dayes, and had not been received into the Church, the same had been a sufficient cause in the Spiritual Court to have deprived him of his Benefice which he then held. But in such and the like cases, the Church was not void *de facto*, without a sentence given in the Ecclesiastical Court: And at this day the King may pardon the Offence; and then he shall not be deprived or ousted of his Benefice by such sentence.

But it is to be noted, That in all cases of Deprivation in the Spiritual Court, there must be a sentence in force against the party; For if sentence should be given in the Spiritual Court

R. 2. st.
Qu. Imp. 143:

Court against the Incumbent for any of the causes aforesaid, and he make his appeal to a Superiour Court, depending the appeal, the first sentence is in suspence, and the Church shall not be void, until the sentence upon the appeal be approved, and confirmed; and if the first sentence be disaffirmed and Repealed, then is the party still Incumbent by force of his first Presentation, Institution and Induction of him to the Church.

Thus much of Avoydance of the Church by Deprivation of the Incumbent, by sentence Ecclesiastical, approved and allowed for sufficient causes of Deprivation at the Common Law.

CHAP.

CHAP. XVIII.

*Of Avoydances by Act of Parliament;
And where upon such Avoydances by
Parliament Notice is requisite: where
not: And what manner of Notice is
sufficient: what not.*

THere is an Avoydance of the Church also by Statute Law, in which cases there needeth not any sentence to be given of Deprivation of the Incumbent in the Spiritual Court.

The Statute of 21. H. 8. cap. 13. is, that if any Parson having a Benefice with Cure of Souls, of the yearly value of 8. l. doth accept and take another Benefice with Cure of Souls, and be instituted and inducted into the same, immediately after possession had thereof, the first Benefice shall be adjudged in Law to be void, and the Patron shall present in such manner and form, as though the incumbent thereof had dyed.

By this Statute, if the incumbent had taken a second Benefice without

*P. Mic. 9. Ctt.
C. B. fol. 441.
The King and
the Bishop of
Canterbury and
Prysts Cases
Cro. I. p. 258.
acc.*

out Dispensation, the first Benefice had been void without any Declaratory sentence of Deprivation made of the incumbent in the Spiritual Court; and of such Avoydance the Patron is to take notice at his peril.

Pasch. 26 Eliz. in the Common Pleas, if a man be presented to a Benefice with Cure of Souls of the value of 8 l. *per an.* and afterwards he is presented unto another Benefice of the value of 20 l. *per an.* and then is deprived for Plurality. It was adjudged in this case, That the Ordinary must give notice to the Patron; for till Deprivation it is no Cession. *Quere,* But if a man hath a Benefice with Cure of Souls of the clear yearly value of 8 l. and taketh another Benefice without Dispensation, and doth not read the Articles of Religion appointed by the Church, and the Act of Parliament, and afterwards dyeth, The admission and institution of him into the second Benefice, was meerly void, and the first Benefice was void by his death, and not by the Statute of 21 H. 8.

7. 9 El. Dyer.

355.

7 Eliz. Dyer.

333.

Co. 4. p. 79.

23 El. Dyer.

377.

The words of the Statute of 21 H. 8. cap. 13. are, *Shall take another Benefice with Cure of Souls of the yearly value of 8 l.*

In the eighth year of the Reign of King James, a Question was in the Court of Common-Pleas, what value the Parliament of 21 H. 8. intended; Whether the very value of the Benefice, or the taxed value, viz. as the same was valued at in the Book of First fruits: The Case was this, The King brought a *Quare Impedit* against the Bishop of Bristol, and Hauleigh Incumbent, for disturbing of him to present to the Church of Smyre in the County of Dorset, which came unto him by Lapse. And set forth the Statute of 21 H. 8. and shewed, That Hauleigh the Incumbent the Defendant was Parson of Smyre, and that Smyre was a Benefice with Cure of Souls, of the value of 8 l. viz. of the value of 30 l. per an. and further set forth, That the Defendant Hauleigh had taken another Benefice with Cure, viz. of Milbury Buck. In the said County of Dorset, by reason whereof, the first Benefice was void, and continued void for two years,

Pasch. 8 Jac. in C.B. the King and the Bishop of Bristol and Hauleighs Case.

years, and so the King ought to present, and the Defendant did disturb him. The Bishop pleaded, That he claimed nothing but the admission and institution as Ordinary. *Hauleigh* the incumbent pleaded a special Plea, *viz.* By Protestation, That the Church of *Swyre* at the time of the making of the Statute of 21 H. 8. was but of the value of 7 l. 14 s. & *non ultra*; and pleaded the Statute of 26 H. 8. by which, the Lord Chancellor had Commission to enquire of the value of all Benefices, and to certifie the same into the Exchequer; and that a Commission was awarded unto divers Knights and Gentlemen in the County, who upon Inquisition found and returned, the Church of *Swyre* to be of the value of 7 l. 14 s. 4 d. which was certified by them into the Exchequer; and that he was instituted and inducted into the Church of *Swyre*; and because the same was but of small value, the Archbishop of *Canterbury* afterwards *quantum in se est*, did grant unto him Dispensation, to take another Benefice, which Dispensation was confirmed by the Kings Letters Patents;

rents; and that afterwards he was presented unto, admitted, instituted, and inducted into the said Church of *Milbury Buck.* being a Benefice with Cure, of the value of 8 *l. per ann.* and upon the plea of the said Defendant *Hauleigh, Henry Hobart* Kr. the Kings Attorney General did demur in Law. This Case was argued by all the Serjeants at the Bar. And *Tr. Pasc. 8 Jacobi* by the Justices, viz. *Foster, Warbarton, Walmesley, and Cook* Chief Justice. And the Court was divided in their opinions; for *Foster, and Walmesley*, Justices, held, That the value should be taken according to the taxed value, and as the same was in the Book of First-fruits. But *Warbarton, and Cook*, Chief Justice, were of opinion, That the value in the Act of 21 H. 8. should be taken the very value of the Benefice, and the Case was adjourned for variance in opinion and difficulty in the Exchequer Chamber. And as I have heard, the Case was afterwards compounded by order from the Kings Majesty. And in the proof and maintenance of the opinions of *Warbarton* and *Cook*, some Presidents were

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shewed

40 Eliz. in
C.B. *Bush* and
Smiths Case.
V. 24 E.3.35.
by *Stone* acc.
3 E.2. Reco-
very in value
1. by *Birrey*.
7 Eliz. *Dyer*
237.
V. *Bond* and
Trikets case.
Tr. 43 Eliz
rot. 564. B.R.
Now reported
in Cro. part 3.
p.858.

shewed in the Court of Common-Pleas. One in 40 *Eliz.* in the Court of Common Pleas between *Bush* and *Smith*; where issue being taken upon the value of the Benefice, the Jury found the value to be according to the very value, and not according to the taxed value, as the same is in the Book of First-fruits. One other president was 41 *Eliz.* between *Bond* and *Triket* for the Parsonage of *Marston*, Where *Anderson* Chief Justice at the Assizes, directed the Jury (the issue being upon the value of the Benefice, to find according to the very value, and not according to the taxed value;) and so the question rested, and was not stirred again untill *Pasch.* 10 *Car. R.* at what time it was moved again in the Court of Common-Pleas; and was there argued by *Brampton* and *Darcy* Serjeants, and the Court then seemed to incline against the Opinions before delivered by *Warbar-ton* and *Cook* in *Hauleighs* Case; but the Case was not then resolved or adjudged, but it remaineth a Question undetermined. *Query the Law.*

The Statute of 13 *Eliz.* cap. 12.
ordain-

ordaineth, That he that doth not subscribe unto the Articles, nor read the Articles of Religion, shall be deprived *ipso facto*; and all his Ecclesiastical promotion shall be void, as if he were naturally dead: Upon such an avoidance, there needeth not any sentence Declaratory of Deprivation of the Incumbent, for there the Church is presently void. And where Avoidance is by Act of Parliament, there needeth not to be any sentence of Deprivation: For if such a Parson or Vicar shall in the Spiritual Court libel against his Parishioners for Tythes; They may there plead against him the not reading of the Articles, without making mention at all, that he was deprived there for the same cause.

31 Eliz. *Morris and Eatons* Case, adjudge. acc.

If one under the age of Twenty three years, be presented unto a Benefice with Cure; It was adjudged, that in such case, That no Lapse shall incur upon any Deprivation, *ipso facto*, without notice; because that the Act of 13 Eliz. cap. 12. speaks nothing of Presentation, so as the Presentation remaining in force, the Patron ought to have notice thereof.

Tr. 13 Eliz. C. B. the Bishop of Hereford and Okeleys Case.

Tr. 18 Eliz. in C. B. the Bishop of Hereford and Okeleys Case.

But if an Incumbent be Deprived for not reading of the Articles, the Ordinary must give notice thereof unto the Patron, and the notice must be certain and particular, that the party hath not read the Articles, and general Notice, *viz.* That he is incapable of the Benefice, is not sufficient: Neither is intimation thereof given at the Church door, or in the Pulpit sufficient; but notice thereof must be given to the Patron, and it must be given by the Ordinary: For if the Patron himself, will of himself take knowledge of the Clerks not reading of the Articles, and suffer two years to pass; yet Lapse shall not run upon the Patron, unless he hath had special notice thereof from the Ordinary, and the Patron hath surceased to present another Clerk to the Church. But if the Clerk be refused by the Ordinary for inability, illiterature, or for any of the causes before mentioned, whereof notice ought to be given the Patron. If the Patron doth dwell in a far and remote County, so as he cannot easily

18 Eliz. Dyer
346.

Tr. 41 Eliz.
B. R. B. Key and
Brents Case.
Cro. 3. part,
679. cc.

22 El. Dyer
369.

ly be found out by the Ordinary ; in such case, if the Ordinary make the inability of the Clerk, or other cause of his refusal of him, known by intimation fixed upon the Church door ; it seemeth, that in that case it is sufficient.

16 Eliz. Dyer.
327. acc.

By the Law, The Presentation unto every Church or Benefice after the same is once void, ought to be *Libera, pura, vera, si Pecunia inter- venerit, non est Presentatio, aut Donatio, sed venditio.* If therefore, there shall be any covenant, contract, promise, or agreement, made with the Patron or any other ; That the Patron for any sum of money, gift, reward, benefit, or other consideration or thing whatsoever valuable, shall present *J. S.* to the Church or Benefice being void ; although the same be made without the consent or knowledge of *J. S.* and afterwards upon such contract, covenant, or consideration, the Patron doth present *J. S.* to the Church or Benefice, and he be admitted, instituted, and inducted into the same, by the Statute of 31 *Eliz. cap. 6.* The presentation, admission, and institution of

him, are absolutely void, *ipso facto*, which were before but voidable by Deprivation; and the King shall have the Turn, and present. For the better proof of this; and to shew the several differences which are taken upon this Statute, and the exposition of the same, I shall remember unto you some special Cases and Presidents, adjudged in our late Books of Reports, and so put an end unto this Chapter.

Parkinson Patron of the Church of *D.* the Church being void, did contract wite a stranger, That for 10 l. *per an.* to be paid unto *Parkinson* the Patron, during the life of one *Kitchyn*, to present the said *Kitchyn* to the Church which was then void, which was done accordingly. And in that case it was adjudged by all the Barons in the Court of Exchequer; That although that *Kitchyn* knew not of the said contract, nor was any wayes agreeing or consenting to the same; that yet he was a Symonist, and came in by Symonie: For it was said by them, That the Statute of 31 *Eliz.* shall be expounded largely against Symonie and Symonists; and the very

ry presentation, admission, institution, and induction of *Kitchyn* in that case was adjudged void.

If a man purchaseth the next Presentation, or Avoidance to a Church, and doth not mention in certain, what person he intendeth to present when the Church shall become void, he may present any person whatsoever who is capable of the Benefice; But if a man purchaseth the next avoidance or presentation; or the next avoidance or presentation be granted unto him to present J. S. by name, be it the son, kinsman of the Patron, or of a stranger; It was adjudged *Pasch. 14 Jac. in C. B. Rot. 1026. in Puliston and Benedict Winscombs case*, That the same is Symonie, and the Clerk presented comes in by Symonie, and the Patron shall lose his Turn, and the King shall present.

If the Brother giveth money to the Patron, to present his younger Brother, being then a Student in the University, the Church being then void; it was adjudged *Pasch. 39 Eliz. in Busbes Case*, That if the Patron doth present him accordingly, that

he comes in by Symonie, and the presentation of him was utterly void; and so it is, in case that if the Testator contract by Symoniacal contract, that his Executors shall present such a man by name to the Church, the Church being then void: and the Testator dyeth, and his Executors do present the same person accordingly: this also was adjudged to be Symonie, Mich. 3 Jac. in the Common Pleas, in *Freeman and Englishes Case*; although the party presented was not privy to the contract.

And so odious a thing is Symonie in the eye of the Law, That if (the Church being void) a man seeketh for money to be presented unto the same, (although that afterwards the Patron doth present the same man *gratis*) it was the opinion of *Tanfield* Lord Chief Baron in his Argument of *Calvert and Kitchyns Case* in the Exchequer; That for this Symoniacal attempt only, he is disabled to take the same Benefice, although in truth he giveth nothing unto the Patron for the same. And every Incumbent who cometh in by reason of such corrupt agreement
or

or contract, or consideration, is so disabled for ever after to be presented to the same Church: That the King himself to whom the Law giveth the presentment, in such case cannot present the same man again to the same Church: as it was holden by the Justices, in the case betwixt the King and the Bishop of *Norwich*: which case see in *Hobarts Reports* 90. For that the Statute being made for the Suppression of Symonie, Symonists, and corrupt agreements, doth so bind the King in those cases, that he cannot enable him, who is disabled by the said Statute. And the party being disabled by Act of Parliament, and the same being an absolute Law, cannot be dispensed withall by any Grant of the King with a *Non obstante*, as a Law may be where a thing is prohibited *sub modo* only, upon a penalty given to the King: and if the King by a special Pardon doth pardon the Symonie, yet that doth not make the person capable of the Benefice, who was disabled by the Statute, nor can he plead the said Pardon against the said Statute of 31. Eliz. as it was Resolved, Mic. 10. Jac.

Jac. in the Court of Common Pleas in *Samsford* and Dr. *Hutchinsons* case.

V. Mic. 9. Car.
in B. R. *Mor-*
kaller and
Todricks case.
Cro. 1. part,
241, 257, 263.

If a man grants a Presentation to B. and B. makes an Obligation to the Grantor to pay him 20. l. when the Church shall become void: It was said by *Reeve* Justice of the Common Pleas, Hil. 17. Car. to which the whole Court agreed, that this was an Obligation made upon a Symoniacal Contract, and so was adjudged in one *Coals* case; and it was said, that in that case the Obligor could not avoid the Bond, but upon a special averment, that it was entered into upon such a Symoniacal contract: But if one present I. S. to the Church which is void, and upon the Presentation of him, he taketh an Obligation of him to resign upon request, that the Obligee may present his Son when he is of full age, to the Church, and capable of the Benefice: it was Resolved in this case, Mic. 8. Jac. in B. R. in *Johns* and *Lawrences* Case, which case V. Cro. 2. part, 248. that the same was a good Obligation, and was not made upon a Symoniacal contract.

If the Church be void by Symonie by the Statute of 31. Eliz. the Ordinary

nary is not bounden to give Notice of the Avoydance within six moneths after the presentment made, as it was adjudged, Mic. 8. Jac. in the Common Pleas in *Goodwins* case: For that for the most part, the contracts by Symonie are made so secret, that the Ordinary cannot have Notice of them, and the Church is void by the Act of Parliament, and therefore no notice is requisite. But if a Clark presented be deprived in the Spiritual Court, there of such Deprivation Notice ought to be given by the exprefs words of the Statute: and so it was holden in *Baker* and *Brents* case: which Case, see in Cro. 3. part. 679.

CHAP.

CHAP. XIX.

Of Avoidance by Resignation : What Resignation is , and to whom to be made ; And when, and where all charges of the Incumbent shall be avoided upon Resignation ; and where not.

THe third means, How the Church may become void, is by Resignation, which is the Act of the party. Resignation is the voluntary yielding up of the Incumbent of his Benefice to make the Church void of his incumbency: If it be of a Benefice with Cure of Souls, the Resignation must be made to the Bishop, who is the immediate Ordinary, by whose admittance and institution he came first into the Church: and cannot be made unto the King as Supream Ordinary in all the Diocesses of *England*; and the reason thereof is, because that upon the Resignation the Ordinary is to give notice to the Patron of the Avoidance, to the intent that the Patron

Patron may present another to the Church; which the Bishop may do, but the King is not bounden to do.

If two Parsons do agree to pre-
mune or change their Benefices; this
can be done or perfected by any of
their own Acts; but there must be a
Resignation of their Benefices first
made unto the Ordinary: and they
must be inducted and settled therein
by him: But if any Resignation be
made of any other Dignity or Pro-
motion Spiritual in the Church, and
not of a Benefice with Cure of Souls,
there to distinguish the Dignity, or
Spiritual Promotion, the Resigna-
tion thereof made unto the King as
Supream Patron or Ordinary is suf-
ficient, so as it be made by fit and
apt words.

Y. 10. H. 6. 11.

Goodman Prebendary of the Pre-
bend of *Cory* in the Cathedral Church
of *Wells*, by Deed enrolled did
grant, render, and confirm unto King
Edward the sixth, *Totam Prebendam*
suam de Cory, & omnia Maneria,
possessiones, jura & hereditamenta quæ-
cunque tam Spiritualia quam Tempo-
ralia, & plenam & liberam dispositio-
nem

nem auctoritatem & potestatem dict. Prebend. perminentem, spectantem sive iucumbentem. Habend. eidem Domino Regi & successoribus suis ad eorum proprium usum ad omnem juris effectum qui ex inde sequi poterit aut potest dictæ Prebendæ; & omnia jura mihi ratione ejusdem: qualitercunque acquisita (ut decet) subjicio; & submitto. It was agreed by all the Judges in this case; 1. That the Resignation of the Dignity made unto the King as Supream Ordinary, was good to extinguish the Dignity, although the same was not made to the immediate Ordinary. 2. That those words were effectual and sufficient in Law to make a Resignation of the Prebend. 3. That by that Deed, and by those words *Canoniam sive Canonicatum*, his Spiritual Function was surrendred up to the King: For by the Law, *Reges sacro oleo uncti spiritualis Jurisdictionis, sunt Capaces.* And again, *Rex est persona mixta cum sacerdote*; and by the Canon and Common Law, Kings are capable of Tythes, Proxies, and other Spiritual things, of which other Lay men are not capable, as is reported by Sir John Davis in his Case
of

of Proxies in his Irish Reports.

The words of substance in the Instrument of Resignation made unto the Ordinary, must be either *renunciare*, *cedere*, or *remittere*, in the case of a common person: For the word [*Resignare*] is no fit or proper word for Resignation of the Church, as it was taken by the *Civilians* in *Goodmans* case: But in case of the Dignity resigned unto the King, The words in the said Grant were holden to be sufficient to make a Resignation of the same.

The time of the Resignation is secondly considerable, and therefore if a man presented unto a Benefice with Cure of Souls be admitted and instituted by the Bishop, the Church in case of a common person is said to be full, and he may resign his Benefice; But where the King is Patron, there because that the Church is not full until Induction, he cannot resign before he be inducted: But in no Case before he be inducted can he charge the Gleab; and if he be inducted, and doth charge the same: yet such charge upon his
Re:

Resignation shall be avoided, and shall bind but only during his own time: as if a Prebendary or Parson makes a Lease for years; and afterwards he resigns, the Lease for years shall be avoided. And so if a Parson or Vicar alien the Gleab of his Church, or permute or change the same, the Successor may enter. But if a Writ of Annuity be brought against a Parson, who prayeth in aid of the Patron and Ordinary, and the aid is granted, and they both make default, and afterwards upon their default, the Parson doth confess the Action, and then doth resign his Benefice, or dyeth, this by the Common Law should have bounden the Patron, Ordinary and the Successor, because the Parson had done as much as lay in him, to have freed and discharged the Gleab, by praying in aid of the Patron and Ordinary.

If a Writ of Annuity, or other Writ be brought against a Parson, or Vicar, and pendant the Writ, the Parson or Vicar resign his Parsonage or Vicarige into the hands of the Ordinary, because the Resignation is the

12. H. 8. 8. by
Pollard.

26. H. 8. 2.

31. H. 7. 1. b.

2. H. 4. 5.

12. H. 8. 9.

20. H. 6. 46. b.

7. H. 6. 38.

22. H. 6. 28.

4. H. 7. 2.

19. H. 6. 39.

10. H. 6. 10.

the Act of the party, he shall not take advantage thereof, and abate the Writ brought against him. But if a Writ be brought by an Incumbent of a Church, and pendant the Writ, he resigns his Benefice, he shall abate his own Writ, if it be brought for any thing in the right of his Church.

The Abbot of *Mornaby* brought a Writ of *Detinue* against J. S. process continued untill J. S. was Outlawed, and afterwards he purchased a pardon of the Outlawry, and had a *Scire Facias* against the Abbot, and the Writ being delivered to the Sheriff, the Sheriff made his Retorn of it, That he could not warn the Abbot, because that before the Writ was delivered unto him, the Abbot was deposed: This by the whole Court was adjudged to be a good Retorn; For the deposing of the Abbot was the act of the Law, and it was done before the Writ was delivered unto him; and after he was deposed he was but a Monk, and so could not be warned without his Sovereign; and the Sovereign could not be warned, because he was not a party to the first Original: But if a Writ be brought

M against

1 H. 6. 2. The
Abbot of *Mornaby*
Case.

2 Ma. Dyer
105.
10 H. 6. 11.

against a Parson or Vicar, and the Parson or Vicar is Deprived for some act of their own, as Incontinency, Drunkenness, &c. there the Writ shall not abate. But the Successor in the case of the Abbot if he die, upon shewing of the matter in Court, shall abate the first Writ.

If an Incumbent taketh forth process against J. S. for any thing which doth concern his Rectory, and after permuteth or changeth his Benefice with another; and before the Return of the Writ the Exchange is avoided, he is in again of his old estate, and his first Action or Writ shall not abate; And so it is, if after his Action brought he resigneth his Benefice, and before the Return of the Writ, he is promoted again to the same Church, this shall make the first Action good.

CHAP.

CHAP. XX.

Of Avoidance by Creation; Whether Notice be requisite thereof. From what time the six Months shall be accounted; And where Writs shall abate upon Creation, where not.

THE fourth and last means of Avoidance of the Church or Benefice with Cure, is by creating of the incumbent thereof a Bishop; For so soon as ever he is Consecrated (but not before) without any Declaratory sentence in the Spiritual Court, all his former Dignities and Benefices are *ipso facto* void; and the King (or other Patrons) shall present unto them; and if they be disturbed, they shall have *Quare Impedit Presentare ad Ecclesiam*. And the reason why the former Benefices are *ipso facto* void, is not only for the inconveniency of Plurality, but also for that it would be very inconvenient, That one and the same man should be Subject, and Sovereign; but until Consecration, his former Benefices are not void: For although he be elected, and confirmed Bishop;

29 H. 8. per.
br. 116.

7 E. 4. 40.

21 E. 3. 40. a.

& b.

41 E. 3. 6.

11 H. 4. 37. by

Hill.

46 E. 3. 32.

22 H. 6. 27.

4 Ma. br. 494.

16 Eliz. Dyer

228.

11 H. 4. 38.

5 Ma. br. 498.

41 E. 3. 6.
11 H. 4. 213.

yet before he be Consecrated, the King may dispense with him, to hold all, or any of his former Dignities or Benefices in *Commendam*; and that the King hath done, and many times doth, where the Bishoprick unto which he is promoted, is but of small Revenue, and not of sufficient competence to support and maintain the Charge and Honour of a Bishop.

Of the Consecration of the Incumbent Bishop, the Patron is to take notice at his peril; and the six moneths shall be accounted from the time of the Consecration, as before is said.

44 E. 3. 9.
14 H. 8. 16.
Cook. 1 part.
Institus. 132.

Consecration of the incumbent Bishop, is the act of the Law, and of the King, and not of the Incumbent. And therefore, if the Incumbent bringeth an Action of his own Free-hold, or Person, and afterwards (pendant the Writ) he be created Bishop, the Writ shall not abate, as the Writ shall do brought by the Incumbent for any thing which doth concern his incumbency, or Rectory, upon the resignation of his Benefice, which is the meer Act of the Incumbent himself.

What are the Incidents to the Creation of a Bishop; How the same is done,

done, and by whose authority; and what acts, or things a Bishop may do after he is Elected, and before he be Consecrated; and how, and by what means his Temporalties are delivered unto him, I have before declared. This only take for a conclusion of this matter of Consecration, *viz.* That as to the perfecting of an Incumbent, and bringing of him into the Church, four things are required, that is to say, Presentation, Admission, Institution, and Induction. So to the promoting of an Incumbent unto the Office and Dignity of a Bishop, there are four things necessary required (of which I have before spoken) *viz.* Election, which hath the resemblance of Presentation; Confirmation, which hath the resemblance of Admission; Consecration, which hath the resemblance of Institution; and Installation, or Inthronation, which hath the resemblance of Induction.

CHAP. XXI.

Of Pluralities: How the Incumbent is capable thereof, and by whose means he is made capable. How by the Canon Lawes, no man was capable of Plurality, and how the King might dispence with the Canon. Where, and in what Cases, and by whom Faculties, Commendams, and Pluralities were granted before the Statutes of 21 and 25 H.8. and 1 Eliz. Of Commendams, Recipere, and Retinere, and their difference. And of Commendams granted at this day by the Archbishops.

I Have briefly set forth how, and by what means a Spiritual person is capable of one Benefice with Cure of Souls; and what be the incidents to make him a perfect Incumbent of the same; I have shewed also, by what acts either of the Law, or of the party he may be deprived and put out of his Benefice after he is inducted into the same. Having thus enabled him, and set him a perfect incumbent of one Benefice; let us now see, whether

ther he be capable of more Benefices with Cure of Souls, or of more Dignities in the Church than one, and by what, and by whose means he is made capable thereof.

It is most certain, That by the Canon of the Church made in the Council of *Lateran*, No Ecclesiastical person whatsoever, could have holden *simul & semel*, two Benefices with Cure of Souls, but upon the taking of the second, the first Benefice was void by the said Canon.

24 E. 3. 33.
39 E. 3. 44.
F. N. B. 34. L.
Cook 4. pa. 75.

In 26 E. 3. *Quare Impedit*. 189. 26 E. 3. Q. 1.
The King brought a *Quare Impedit*, by Imp. 189.
reason of the avoidance of a Church by a Plurality by the said Canon. The Defendant would have demurred to the Jurisdiction, but he durst not do it, for that the same was a Spiritual thing, and tryable by the Ecclesiastical Court; wherefore he pleaded another plea, *viz.* That the Church did become void, the Temporalities being in the Kings hands.

And *vide*, and note upon the 10 Aff. p. 4.
Book of 10 Aff. p. 4. where it is
said, it may be collected out of that

M 4. Book;

Book; that a Benefice of the value of 10 l. *per an.* is said to be a sufficient advancement for a Clerk.

The said Canon of the Church made in the said Council of *Lateran*, as to the matter of substance thereof, is now as it were ratified, made good, and confirmed by the Statute of 21 H. 8. cap. 13. But before the said Statute, The King now, and the Pope before, notwithstanding the Ecclesiastical Canon, did by usurpation, and the King might *de jure* have dispensed with the said Canon, and might have enabled the Incumbent of any Church or Benefice with Cure of Souls to have taken a second Benefice, with Dispensation granted unto him; and so might the King have dispensed with any man to have holden any other Spiritual Dignity or Promotion in the Church together with his other Benefices. And the reason why the King might have dispensed with the said Canon, was, for that anciently Kings, and Lay Subjects, by Licences from the King, were the first Donors of Benefices and Ecclesiastical Dignities to Ecclesiastical persons: For as one saith,
The

The Donations were *Eleemosynas Regum & Laicorum*; And also for that such Dispensations were not repugnant to the Common Lawes of the Realm: For that by the Common-Law, by the taking of a second Benefice, the first Benefice was not void, but was voidable only by the said Ecclesiasticall Canon; and the King notwithstanding the said Canon, did give licence to Incumbents of Churches with Cure of Souls, to hold two Benefices: For we read, That *Edmund* the Monk of *Bury* held many Benefices by vertue of such Dispensations; And it hath been seen (saith *Haukford*) in 11 H. 4. 91. That one man hath been Abbot of *Glassenbury*, and Bishop of another Church *simul & semel*.

Here two Questions may materially be moved; The first, If a man be Parson of a Church Improprate, with a Vicar perpetually indowed, and he that is the Parson accepteth of a Presentation unto the Vicarige without Dispensation; Whether the same be a Plurality by the said Canon; and also by the Statute of 21 H. 8. cap. 13. And I conceive the

the Law to be, That notwithstanding that they are several Advowsons, and that several *Quare Impeditis* may be brought of them, and that several Actions may be maintained concerning their possession: Yet I conceive That the presentment of one and the same man unto the Parsonage and Vicarige, neither before the said Canon, nor since, to be any Plurality: First, Because the Parsonage and Vicarige are both but one Cure, and that appeareth in the *Proviso* in the Statute of 21. H. 8. sect. 25. the words of which *Proviso* are; Provided, that no Parsonage that hath a Vicar endowed, be taken under the name of a Benefice with Cure of souls. And secondly, Because the Parsonage and Vicarige are but one, the Vicarige being endowed out of the Parsonage, and a man may be his own Vicar. And of this opinion was *Hobart* Lord Chief Justice of the Court of Common Pleas. *Mich.* 21. Jac. in *Woodley* and *Mannorings* Case.

The second Question is, Whether the Presentation of one man unto several Advowsons or Livings in one Church, each of them being of the

the value of 8. l. be now a Plurality or not, and I do conceive it to be no Plurality: First, Because it is out of the intent and meaning of the said Canon; the words of which are, *Plurima potissimum Beneficia quibus animarum Cura submissa est, non sine gravi Ecclesiarum damno ab uno obtineri, cum unus in pluribus Ecclesiis rite officia persolvere aut rebus earum Curam necessariam impendere nequeat;* But in this Case, 1. The Parson is not in *pluribus Ecclesiis*, but in one Church. 2. When there are several Advowsons, (as in this Case) one Parson hath not the whole Church, nor the whole Cure of souls; and the words of the Statute of 21 H. 8. are, If any Parson having one Benefice with Cure of souls, of the value of 8. l. accept and take another Benefice with Cure of souls, &c. But in this Case, he hath not one whole Benefice, nor hath he the whole Cure of souls. And as in case, If a Consolidation be made of three Churches, they are all now one incumbency, although the Advowsons be several for the Patrons to present by turns; and the *Writ of Quare Impedit*

Impedit shall be *presentare ad Ecclesiam*; for now upon the matter there is but one Church, and one incumbent: So in this case, The Church upon the matter, shall be but one, and so the same is no Plurality, either by the said Canon, or within the said Statute of 21. H. 8.

As the King might by the Common Law, notwithstanding the said Ecclesiastical Canon, grant Dispensations to hold divers Benefices in *Commendam*: So may he do at this day notwithstanding the Statute of 21. H. 8. For the power which the Pope had by usurpation in this Realm in granting of Faculties, Pluralities, and Commendams, &c. is absolutely now taken away by the Statute of 21. H. 8. and by the said Statute, and by the Statute of 1. Eliz. the same is transferred and settled in the King *de jure*, and from and under the King, in the Archbishop of *Canterbury*, his Commissaries & sufficient Deputies, who have the granting of them under him by authority derived from the Crown: But then it is to be noted, That there is a great difference between Dispensations, and Facul-

Faculties granted by the Pope in ancient times, and Faculties granted by the King and Archbishop at this day. At this day, a Dispensation granted by the Archbishop, and confirmed by the Kings Letters Patents (as the same must be) *retinere Beneficium cum cura animarum*, is good only to such a person who is full and perfect incumbent of the Church at the time of the Dispensation to him, and is not good to him who is not incumbent at the time of the grant: but it was otherwise sometimes, where Dispensations were granted by the Pope.

A prebendary of *Salisbury* was elected Bishop of *St. Davids*, and before he was Consecrated, he obtained a Dispensation from the Pope *retinere*, all his Benefices in *Commendam*, and afterwards he was Consecrated Bishop: And the better opinion of the book of 11. H. 4. 170, 213, 229. is, That the King could not have a *Quare Impedit* against the Bishop for the Prebend, nor any action upon the Statute of 25. E. 3. which gave the Presentation to the King, where the Pope by provision gave any benefice whereof the Patronage did

did belong unto a Spiritual person. And by *Haukford*, in that Case of Dispensation *retinere*, the Bishop shall not pay first fruits; but it was there much debated, and at last agreed, That if the Dispensation *retinere* had been granted unto him after the Bishop had been Consecrated, whether the Prebend had been void, and whether any Faculty could have been granted to have enabled him to have holden the same against the King: But at this day the King *ex autoritate sua Regia qua fungitur*, may grant unto a Bishop after he is Consecrated Dispensation *recipere & obtinere Beneficium cum cura animarum*, by presentation, institution, and induction, and to hold the same in *Commendam*; for so the Pope used to do by usurpation in this Realm; and the same power which the Pope had, is by the Acts of Parliament in 25. H. 8. and 1. Eliz. acknowledged to be in the King *de jure*.

Cook 4. part.
75. in *Holland's*
Case.

Cook 4. part.
79. *Dighies*
Case.

If a man be instituted and inducted into a Benefice with Cure, of the value of 8. l. *per an.* and afterwards the King presents him to another Church, which is a Benefice with Cure;

Cure, and he is admitted, and instituted; and afterwards the Archbishop of *Canterbury* grants him Letters of Dispensation to hold two Benefices, and the King confirms the same, and afterwards he is inducted into the second Benefice, there the Dispensation comes too late, because by the institution into the second Benefice, the first Benefice was void by the Statute of 21. H. 8. But where a man is incumbent of a Church, and Parson or Vicar *de facto*, there a Dispensation *retinere* the same Benefice, upon his promotion to the office, or dignity of a Bishop, comes time enough, as it was holden Pasc. 3. Car. in B. R. in *Evans* and *Ascoughs* case: and such Dispensation, or Faculty, granted by the Archbishop his Commissary, or by the Guardian of the Spiritualities (*sede vacante*) is sufficient, although the same be not enrolled in the Chancery, or in any other the Kings Courts of Record, but only entred in the office of Register of the Archbishop.

The Corporation of *Kilkenny* in *Vi. the case of Commend. in Ireland* were Patrons of a Vicarage, *Sic Joh. Davies Reports.* within the Dioceses of *Oserry*, and pre-

presented A. unto the same, who was admitted, instituted, and inducted, and during the life of the incumbent the Church being full, the Archbishop of Dublin granted unto I. S. then Bishop of Oſorry, that *unum vel plura Beneficia, curata vel non curata, retinere possit perpetuæ Commendæ titulo*, which was confirmed by the Kings Letters Patents; A. died, and the Church was void by six months; And the Bishop of Oſorry by vertue of the same Dispensation did retain the Vicarige in *Commendam*; and it was holden there by many good Lawyers, That the Faculty was well executed to the Bishop by his acceptance without a Presentation, Institution, and Induction into the same; for it was said, That those Ceremonies were not necessary for the conferring of the Vicarige to the Bishop, because the same might have been done by other wayes, *viz.* by union or appropriation; for so it was in *Grendons* case, which see Mr. *Plowdens* Comment. 500. But quere of that Case; for it was not adjudged: and the Bishop was not the present incumbent of the Church, and so the *Commendam* *retinere*

retinere as before is said, void according to the opinion delivered in Co. 4. part, in *Hollands Case*. And yet *vid.* *Trinit. 11 Jacobi* in Co. B. the Case between *Colt* and the Bishop of *Coventry* and *Lichfield*, where such a Dispensation granted by the Dean and Chapter, Guardians of the Spiritualties (*sede vacante*) of the Archbishop to the Bishop of *Coventry* and *Lichfield*, *retinere* any Benefice under the value of two hundred marks *per an.* in *Commendam*, and that he might hold the same without any Presentation, Admission or Institution, was pleaded by the Bishop, and the plea holden to be good; but *Quere.*

Vi. & Leg.
Colt and the
 Bishop of
Coventry case
 at large re-
 ported in *Hob-*
arts Reports
 from fo. 146.
 to 163.

N

CHAP.

CHAP. XXII.

Who may be dispensed withall to have Plurality within 21 H. 8. Of Retainer of Chaplains, and how many Chaplains Noble Men, and Officers of Honour and Place may retain. What shall be a good Retainer of a Chaplain; and where Dispensation granted to such Chaplain for Plurality shall be good, where not.

WHat persons are capable of Pluralities, and what to grant them at this day, and what not, appears by the Statute of 21 H. 8. cap. 13.

The King, Queen, Prince and other the Kings Children are not limited within the Statute how many Chaplains they shall retain: and therefore they may retain as many Chaplains as they please; and every of their Chaplains may purchase a Dispensation to purchase a Plurality. But Archbishops, Bishops, Dukes, Marquesses, Earls, Countesses, Barons, and all other Officers of Honour and Dignity mentioned

mentioned in the Statute, are stinted how many Chaplains every of them may retain, who are capable to have plurality. And the Qualifications of such their Chaplains, must be *sub signo & sigillo*, of the said King, Lord, &c. otherwise the same is not good, as it was Resolved, 28 Eliz. in *Savacres Case*.

A Countess may retain two Chaplains within the Statute, and each of them may purchase Dispensation to have and to hold two Benefices with Cure of Souls. But if a Countess who is a Widow doth retain two Chaplains, and afterwards doth retain a third Chaplain, and the third Chaplain doth before any of the other two, purchase a Dispensation to hold two Benefices with Cure, his first Benefice being of the clear value of 8 l. the first Benefice is void by the Statute: For that, when the Countess hath retained two Chaplains, those two are only capable of Dispensation within the Statute, and the Retainer of the third Chaplain cannot devest the capacity of Dispensation which was vested by their

Co. 4. part.
90. *Dynwies*
Case

Reteiner in the two first Chaplains ; and therefore the Dispensation purchased by the third Chaplain is void, and comes too late to make him capable of Plurality, and so his first Benefice is void by the Statute.

18 Eliz. Dyer.
312.

If a Baron, who is allowed but three Chaplains, doth retein six by his Letters Testimonials under his hand and seal at one time ; and all six of them are preferred to six several Pluralities ; the three first Chaplains are only warranted by the Statute, and Dispensation for Pluralities purchased by them, only is good ; and the three last shall not be reputed his Chaplains within the Statute, so long as the first three are in his service, or are living ; and therefore the purchase of Dispensation by the three last for Pluralities are meerly void.

Co. 4. part, 9.
27. Pas. 29 El.
C. B. Swares
Case.
Co. 4. part, 90.
Pas. 28 El. in
Co. B. Rot.
1130 Swares
Case, acc.

If a Baron doth retein three Chaplains according to the Statute, and each of them purchaseth a Dispensation for Plurality, and are advanced according to the Statute ; if the Baron afterwards dischargeth one of them of his service, he cannot retein another during the life of him that is discharged ;

discharged; for then the *Statute* should be defrauded, and he might advance Chaplains without number.

If a Countess that is a Widow, Co. 4. par. 118. Affons Case. doth retain a Chaplain, and he purchaseth a Dispensation for Plurality, and afterward the Countess enter-marrieth with a Peer of the Realm, and afterwards the Chaplain is admitted, instituted and inducted into a second Benefice with Cure; This is well and good in Law, for that the Retainer was not countermanded by the entermarriage. But if an Earl or Baron retaineth a Chaplain, and before he be advanced unto any Benefice, the Earl or Baron be attainted, Co. 4. par. 119. The Countess of Westmerylands Case. now is the Retainer thereby determined before the Dispensation obtained; and therefore if such a Parson having a Benefice with Cure of souls, of the value of 8 l. *per annum*, doth afterwards without other Dispensation obtained, take another Benefice, the first Benefice is void by the *Statute*.

The *Statute* of 21 H. 8. cap. 13. shall be construed largely against Pluralities, as being prejudicial to the

service of God, and the instruction of the people. And therefore if a Bishop be translated, and made an Archbishop, and holdeth both Dignities, or a Baron be created an Earl, although he hath both the Dignities and Honours conjoynd in one person; yet shall he have but so many Chaplains, as an Archbishop or Earl may have, who shall be capable of Dispensation to have two Benefices with Cure within the Statute.

18 Eliz. Dyer
347.

If a man long before the making of the Statute of 21 H. 8. hath a Dispensation from the Pope for a Plurality; and at the time of the making of the Statute of 21 H. 8. hath one Benefice with Cure of Souls of the yearly value of 8 l. *per an.* and within one year after the making of the Statute of 28 H. 8. cap. 16. he obtaineth a Confirmation of his former Dispensation, with words in the Confirmation, to hold, use, and enjoy the effect of his Dispensation; yet by the Opinions of *Mounson* and *Manwood* Justices, the first Benefice is void by the Statute of 21 H. 8. and the Statute of 28 H. 8. cap. 16. doth not restore

restore him to the same without a new Presentation, notwithstanding that the Statute of 28 H. 8. made the Bulls of Dispensation made by the Pope good for one year; and if they be surrendred, That the Chancellor of the Augmentation may make a new Dispensation unto him. But by *Dyer* Justice, as the Statute of 21 H. 8. made the first Benefice void. So the Statute of 28 H. 8. cap. 16. did restore him to the Benefice; for when two Statutes are cross in appearance the one to the other, and no Clause of *Non obstante* be contained in the second Statute, so that the one may stand with the other, such Construction shall be made of the Statutes, that both of them shall take effect.

The Statute of 21 H. 8. would not that there should be a parity or equality of all persons in the pale of the Church; *Nihil enim est majus inaequale quam Aequalitas.* And therefore the Statute provided that some Ministers and Ecclesiasticall persons should have precedency of others; 1. In respect of the persons

of Dignity upon whom they were attendants. 2. In respect of their births and bloods. 3. In respect of their Degrees which they have taken within the two Universities of this Realm. And therefore, 1. The Chaplains of the King, Queen, Prince and their Children may have as many Benefices with Cure of Souls, as it shall please the King, Queen, or their Children to confer upon them, of any value whatsoever. So every Archbishop may have eight Chaplains, because he must use eight at the Consecration of every Bishop: every other Bishop four Chaplains; every Duke, Dutcheſs, Marqueſs, Earl, Counteſs, Baron, or Baroneſs Dowager two Chaplains; every Knight of the Garter three Chaplains, and every one of their Chaplains may purchase a Dispensation to have and hold a Plurality or two Benefices of Cure of souls of any value whatsoever. So 2. the Brethren and Sons of all Temporal Lords born in Wedlock, may have Licence or Dispensation to take, and keep as many Benefices as the Chaplains of a Duke, or Archbishop; the Sons and

and Brethren of every Knight may purchase Dispensation to receive and take two Benefices with Cure of Souls : 3. In respect of their Degrees : So all Doctors and Batchellors of Divinity, Doctors of Law, and Batchellors of the Canon Law, who are admitted to their Degrees by the Universities, and not of Grace, may purchase Licence or Dispensation to have, and keep two Benefices with Cure of Souls. Inso-
much that if we consider of the Nobility now in *England*, the Offices of Honour and Place, the Sons and Brethren of Noblemen and Knights, and other deserving men within the Realm who have taken the Degrees aforesaid : it cannot be thought but that all, or the most part of the Clergy men within the Realm of *England*, have at this day or may have Plurality, or two Benefices with Cure of Souls within the said Statute of 21. H. 8. Again, if we look upon the Parochial Churches within the Realm ; the Dignities of Archdeaconries, Deaneries, Prebendaries, and other Ecclesiastical

cal Dignities and Promotions, given to persons within the Realm; it cannot be imagined, but that all Scholars, Ministers, and other Ecclesiastical persons within the Realm, of Learning and Merit, are now better provided for by this Law of 21. H. 8. then they were in antient times, when Dispensations for Pluralities, Commendams, and Faculties were granted, and obtained by the Clergy of England from the Bishop of Rome.

CHAP.

CHAP. XXIII.

What Right or Interest the Parson or Vicar have to the Church: Of the Rights of the Patron and Ordinary: In whom the Fee-simple of the Gleab of the Parsonage and Vicarage is: Who shall be said to be the Patron of a Vicarage endowed: What Actions the Parson and Vicar may have for the Freehold of the Church and Gleab. And whether a Jus utrum will lye by the Vicar against the Parson for the Gleab of the Vicarage.

BY degrees I have brought the Clark presented not only into the real possession of one Church or Benefice with Cure, but have shewed unto you, that if he be Qualified within the Statute of 21. H. 8. how that he may purchase Licence, or Dispensation to take and receive plurality, or two Benefices with cure of Souls.

Now it remaineth that I do declare unto you, what Right or Interest

rest the Parson or Vicar have in the Church or Gleab Lands after their Inductions into the same, and what Right and Interest the Patron and Ordinary likewise have in the same.

Their Rights unto the Advowson and to the Church, and Gleab Lands thereunto belonging, are of several Natures. The Parson, or Vicar hath *Jus possessionis*, a right unto the possession of the Church and Gleab, for that the Parson hath in himself the Freehold, and is to receive the profits of the Church and Gleab, and the Oblations, Tythes and Offerings to his own use. The Patron hath *Jus presentationis*, the right of presentation of his Clark unto the Ordinary to be admitted, instituted and Inducted into the Church. The right of the Ordinary is *Jus Ordinationis*, a right of enabling and investiture of the Incumbent, and to see the Cure to be served: The Parson hath *Jus habendi*, *Jus retinendi*, *Jus possidendi*: He may have, possess and retain the Profits, Tythes, Obventions and Offerings to his own use, without the Patrons, and Ordinaries consent, and nothing can be done by them

them during his incumbency to charge the Church, or his Successor without his consent and agreement: But the Rights of the Patron and Ordinary are only Collateral Rights: for that none of them can have, retain, or possess the Church or Gleab themselves: And yet the Patron and Ordinary have *Jus disponendi*, a kind a Disposition in the Church. For that no charge could have been laid upon the Church in perpetuity to have bounden the Successors of the Parson, unless the Patron and Ordinary had agreed thereunto. And therefore, if a Writ of Annuity had been brought against the Parson, and he had prayed in aid of the Patron and Ordinary, and the Patron had made default, and the Ordinary had appeared and confessed the action; Or if the Ordinary had made default, and the Patron had confessed the action; this should not have bounden the Parson or his Successor. But if they had both appeared and pleaded nothing, by the Common Law this should have bounden the Church in perpetuity: for that *Qui tacet Consentire videtur.*

But

12. H. 2. 7.
 19. H. 6. 75.
 21. H. 6. 3. & 8.
 39. H. 6. 40.
 P. 14.
 28. H. 6. 1. & 2.

16. E. 3.
Annuity, 24.
20. E. 3. An.
nuity 32.
7. E. 4. 40.
40. E. 3. 30.
Cook 1. part,
Instit. 343.

38 E. 3. br.
Qu. Imp. 66.
38. E. 3. 31.
acc. adjudged,

But if the Parson himself, with the consent only of the Ordinary had granted unto another man an Annuity out of the Gleab, have *quid pro quo*, in consideration thereof; This should have bounden the Successor of the Parson at the Common Law without the consent of the Patron. Also in some Cases the Action of the Patron himself alone would have bounden the Incumbent: and therefore if a recovery had been by action tryed against the Patron where the Right of the Patronage had been in question: there the present Incumbent should not have put the Right again in tryal, but he should have been bounden thereby by the Common Law; nor was he helped herein by the Statute of 25. E. 3. cap. 7. if the Patron had not pleaded faintly; but the Parson should have been bounden by the Judgment: yet by the opinion of Mr. Fitzherbert, in his *Natura Brevium* 49. a. saith, that the Successor of the Parson, after such a Recovery had against his Predecessor by action tryed, might have had a Writ of *juris utrum*, notwithstanding such Recovery: *vid.*

7. H. 6. 36.

7. H. 6. 36. That the Parson shall not have a Writ to the Bishop, if it be found for him, if the Patron made default: But the Parson himself as I said before, hath the Freehold in him, and hath the Right of the Church, Church-yard and Gleab in him: of which, if he be put out of possession, or disseised, he may have an Assize; *vide* to that purpose 28 H. 6. 19. by *Markham*: if the Parson be ejected, he shall have Trespass, or he may have an Assize if disseised of his Church-yard: and so also may the Vicar have against a stranger if he be disseised thereof, but not against the Parson himself: as the book of 13. R. 2. Fitz. tit. Jurisdiction 19. is: For it is agreed in 11. H. 4. 12. That of such things as are annexed unto the Church or Gleab, or for cutting down of the Trees, or doing of Trespass in the Church-yard, or Gleab, the Parson shall have an Assize, or an action of Trespass, for that the Right and Interest of them is in the Parson. But for the Ornaments of the Church, or for the Bells in the Steeple, the Parson shall not have the Action if they ^{17. H. 3. Prohib. 26.} ^{11. H. 4. 12. acc.} be

be taken away, but the Church-wardens.

8 H. 7. 12.

If a Seat be set in the Church, and afterwards the same be taken away by a stranger, the Parson shall not have the Action; and the reason thereof is, because the same is not fixed to the Freehold; but in such case the Action is given to the Church-wardens, or to the party unto whom the Seat doth belong and appertain.

If the Coat Armour, Pendants of Arms, or Scutcheons of Arms of any Noble man, or Gentleman, that are hung in the Chancell, or in the body of the Church in honour of the party buried there, be taken down, or carried away by the Parson, or Vicar, an Action will lie against them by the Heir or Executor of the party deceased; For these are no Obligations that belong to the Freehold of the Church: But such is the Interest of the Parson in the Freehold and Gleab of his Church, as before is said, that he shall, and may have an Affize thereof: and if he be impleaded in any Action real of the Freehold, he shall have
aid

aid of the Patron and Ordinary.

But the Freehold being in the Parson, it hath been much controverted in our Books, in whom the Fee-simple of the Gleab of the Parsonage and the Vicarage is; 1. Some authorities are, and some are of opinion, That the Parson hath the Fee-simple of the Gleab in him, and that for these reasons, *viz.* 1. They say, That a Parson is a Spiritual Corporation, and Lands may be given unto him in Frankalmoigne; and every gift in Frankalmoigne, setteth the Fee-simple in the Donee, and supposeth a Fee-simple to pass. 2. They say, That the Parson hath brought a Writ of Right in the nature of a *Quod permittat* of a Common, and counted, that he was seised in *fee & droit*, and the Writ hath been admitted good by the Judgement of the Court. See to that purpose 31 E. 3. Fitz. *Quod permittat*, 8. and Fitz. *Natura Bre-vium* 50. R. See also *Temps* E. 1. title *Quod permittat*, 9. where a Parson brought a *Quod permittat* of the seisin of his predecessor of Estovers, and counted of a seisin in fee, and joyned the *mise* upon thee meer right, And

it is said by *Parson* in 8 H. 6. 24. That a Parson may joyn the mise upon the meer right ; If the Parson dieth, the freehold of the Gleab is not in the Patron ; neither can any Action be brought for the Gleab untill there be another Parson. And it is the better opinion of the book of 8 H. 6. 24. That if a *Precipe quod reddat*, or a *Scire Facias* to execute a recovery in a Writ of *Cessavit*, he shall not have Aid. 3. They say, That if the Parson doth make a Lease for his own life of any part of the Gleab, that he hath a reversion in him and may be vouched ; and this appeareth by the Book of 9 E. 3. Fitz. title Aid. 19. Where in a *Formedon* brought against J. S. the tenant pleaded, That W. was Vicar of the Church of S. and made a Lease to him for life, and vouched the Vicar, who entered into warranty, and pleaded, That he found the Church seised of the Lands as parcel of the Gleab of the Vicarage ; and that A. was Parson of the Church and prayed in Aid of him, and the Aid was granted ; by which case say they, it appeareth, That *Voucher* and *Aid prayer* shall be had against

9 E. 3. *Juris*
statutum 18.

against a Parson. 4. They say, That the Feeſimple is in the Parſon, and not in the Patron, for that the words of the Writ of *Juris Utrum* are, *utrum ſit libera Eleemoſyna Eccleſiæ de D.* and not of the Patron. But notwithstanding theſe reaſons and authorities above mentioned, I conceive the Law to be, that the Parſon hath not the abſolute Feeſimple of the Gleab in him, and at the leaſt, but a qualified Feeſimple, and that the abſolute Feeſimple of it according to the opinion of Mr. *Littleton*, is in abeyance, or in *Nubibus*, that is to ſay, in the intendment, or conſideration of the Law; and it was provided, that it ſhould be ſo, by the wiſdom and policy of the Law, that the Parſon and Vicar, who have *Curam animarum*, and are bound to celebrate Divine Service, adminiſter the Sacraments, and the like, might have ſomewhat to live upon; and therefore the Law provided that the Feeſimple of the Gleab ſhould not be in them, but rather out of them, that no alteration or diſcontinuance thereof by the preſent Incumbent might be a bar unto the Succeſſors, and ſo leave them

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them destitute without a convenient maintenance; and for that they could not by the wisdom and policy provided as aforesaid, alien or discontinue the Gleab lands (for any discontinuance did give a fee) it necessarily followeth, that the absolute Fee-simple of the Gleab was not in them. Neither could the Parson have or maintain a Writ of Right of Advowson, or other Writ grounded upon the meer Right; which is a manifest proof that he hath not the absolute Fee-simple of the Gleab in him.

43 Aff. 13.

An Assise of *Novel disseisin*, was brought against a Parson of part of his Gleab lands: he pleaded, That he was presented to the Church by the King, and prayed an Aid of the King, and the Aid was granted; and Aid shall never be granted to one who hath the absolute Fee-simple of the Lands in him.

8 H. 6. 26:
19 H. 6. 39:
10 H. 6. 5.
Cook 6. part,
in *Ferrers*
Case.

If a Writ of Right be brought against a Parson, and after the mise is joyned he makes default, and Judgement be given against him upon his default, this shall not bind the Successor, but the successor shall have a *Juris Nitrum*, because the Parson did not pray
in

in Aid of the Patron and Ordinary; and he had not the meer Right in him to lose by his default; and in that case, the Parson himself might have had a Writ of *Juris Utrum*, notwithstanding the bar in the former action; for that is his Writ of Right, and a Vi. Lit. sect. 646. Writ of the highest nature that a Parson can have.

Vicariges where originally endowed out of Parsonages, and the Vicar was to have Aid of the Parson if he were impleaded for any thing which concerned his Vicarige, and the Parson was subject to every charge of the Vicarige; and the Vicar in antient time was not esteemed the Tenant of the Freehold of the Gleab of the Vicarige, but the Freehold thereof was in the Parson, and the Vicar himself was not such a Parson against whom the Lands of the Vicarige could be demanded; neither did any Precipe lye against him as Vicar, nor could he maintain an Assise in his own name.

31 H. 6. 13. by
Telvinton.

9 Aff. 3.
40 E. 3. 27.

8 Aff. 36.
15 Aff. 8. acc.

12 E. 3. Fitz. tit. Brief. 256. in an Assise brought against a Vicar, he pleaded, That he had nothing but as Vicar, and demanded Judgement of the

the Writ, the Plaintiff said, That he was seised untill he was disseised by him ; and that it was holden, That if he had found the Vicarige seised, that then it was a good plea : But in that case it was holden and agreed, That a Vicar should not have an Assise in his own name. But yet I finde in 4 E. 3. title Brief. 704. A Writ of Intrusion was brought against a Vicar, who pleaded unto the Writ, That the Freehold was in the Parson, and notwithstanding that plea, the Writ did not abate. But the reason of that Case might be, for that the Intrusion was a tortious act, and a personal wrong, and therefore the person of the Vicar was charged therein and therewith ; and yet in that case, the Vicar had Aid of the Parson and Ordinary, by which it appeareth that the Freehold was in the Vicar himself, but not the Fee-simple of the Gleab of the Vicarige. And I hold the Law to be, That the Freehold of the Gleab of the Vicarige is in the Vicar himself, and not in the Parson, for that the possessions of the Vicar and Parson are severed, and every of them shall have several Writs

Writs concerning the Rights which do appertain unto them, and shall not joyn in one Writ; and they shall pay their Tenths and other charges lyable upon their severall Gleab Lands severally by themselves; and the Vicar at this day shall have and maintain a Writ of *Juris Utrum* against the Parson, who is the Patron of the Gleab of the Vicarige for the same Gleab: by all which it appeareth unto me, that the Freehold thereof is in the Vicar upon his first endowment; and that for the absolute Fee-simple of the Gleab of the Vicarige, the same is in the Intendment and Consideration of the Law in *Nubibus*, as the Fee-simple of the Gleab of the Parsonage, as in Case of the Parson, as before is said.

Before I conclude this Chapter, it will not be impertinent concerning the Right of Patronage to determine a Question made in our Books, which is this, *viz.* If there be Parson and Vicar endowed in one Church, and the Vicarige becomes void; who shall be said to be the Patron of the Vicarige? whether the Patron of the Parsonage, or the Par-

son? In 17 E. 3. 51. Some of the Judges are of Opinion, That the Advowson of the Vicarige doth appertain to the Parson; Others, That it belongeth to the first Patron; and the Court is divided in Opinion, Mic. 16 E. 3. Fitz. Qu. Imp. 145. by *Parninge* and *Hill*, they encline that it is in the Patron; for there they say, that the Ordinary cannot make a Vicar without the Assent of the Patron.

5 E. 2. Qu. Imp. 165. puts the Case, That although the Vicarige be endowed with the assent of the Patron and Ordinary, yet the Advowson of the Vicarige doth remain in the Parson, because the same is parcel of the Advowson of the Parsonage.

17 E. 3. Grants
66.

13 R. 2. Jurisdiction 19.

16 E. 3. Mans
defaults 166.

16 E. 3. Grants 56. it was a Question, if by the Grant of the Advowson of the Church, the Advowson of the Vicarige did by-pass; and there it is said by *Stowe*, That it doth pass as incident to the Parsonage.

Mic. 31 Eliz.

C. B. *Ashgell*

and *Dennis*

Case. Vide

Leon. Reports.

Rep. 1. p. 191.

In Mich. 31 Eliz. in C. B. there was a Case between *Ashgell* and *Dennis*, which was this, viz. The King was seized of the Rectory of D. and of

of the Advowson of the Vicarige of D. and by his Letters granted to I. S. *Reſtoriam prædictam cum pertinentiis, ac etiam Vicariam Ecclesie prædictæ.* In that case, it was resolved by all the Justices of the said Court, That by those words, the Advowson of the Vicarige did not pass: But if the King had granted *Ecclesiam suam de D.* the Advowson of the Vicarige had passed.

31 H. 6. 13. and 14. by *Hengiston*, The Parsonage and Vicarige are all but one, and he who is Patron of the Parsonage, is Patron of the Vicarige; and *Fortescue* there doth agree the same; But notwithstanding those Authorities, I conceive first, that *de jure*, the Parson is Patron of the Vicarige, unless upon the Endowment by the Ordinary it be otherwise provided: and so saith Mr. *Fitzberbert* in his N. B. 33. That the Presentation to the Vicarige doth belong unto the Parson of Common Right, if it be not otherwise agreed unto. 2. H. 3. Grants 89. & *Perkins* 123. If a man grant by Fine the Parsonage, saving the Presentation to the Vicarige, it is a good saving,

saving, and the Parson shall present when the same is void. 2. Common Experience is, that where there is an Appropriation, and a Vicar endowed, that the persons to whom the Appropriation was made, were alwayes accounted Patrons of the Vicarige: And 50. E. 3. 26. an Abbot who had an Advowson appropriate, upon which there was a Vicarige endowed, did present unto the Vicarige, wherewith agreeth the book 17. E. 2. Qu. Imp. 178. 3. It is manifest by reason; for as the Patronage of the Church doth appertain unto him who was the first Founder of the Church, and endowed the same with Lands: so in regard that the indowment of the Vicarige is taken out of the Parsonage, and out of the estate of the Parson, and if he be impleaded of his Gleab, he shall have aid of the Parson: and also if the Vicarige be diminished, the Ordinary may increase the Endowment of it out of the Parsonage, as the Book of 31. H. 6. 13. is; it is but reason that the Parson have the Patronage of it: Again, the Vicar is Substitute to the Parson, and his Endow-

Endowment at the first either of Lands or other things was only as a maintenance for him, in Officiating the Cure for the ease of the Parson; and also that it belongeth to the Parson to see that there be a fit able and honest man, of whose Care, ability, and Learning he may be assured, sufficient to Officiate the Cure; Therefore it standeth with good reason, that the Parson be his Patron, and present such a one to the Vicarige as shall be sufficient, and of ability to serve the Cure. And therefore, notwithstanding the former Authorities, I conceive, that the Patronage of the Vicarige doth *de jure* belong unto the Parson, and not to the first Patron of the Parsonage Appropriate.

CHAP.

CHAP. XXIV.

Of Usurpation, and where the same shall put the Rightfull Patron out of the possession of the Church, or his Advowson; where not.

I Have in the former Chapter considered the Rights of the Patron, and Ordinary, and of the Incumbent, and what remedy the Incumbent hath, if he be ousted, or disseized of his Church, or Gleab Lands. Let us now return to the Patron, and see by what, and whose acts the Patron may be ousted of his Advowson, or presentation to the Church. I said before, That Patrons might be put out of their Advowsons by Disseisins, Discontinuance of the Mannors or Lands to which the Advowsons were Appendants, and by Usurpations, of Disseisins, and of the Discontinuance of the Mannors and Lands, and where the Patron shall present before his entry, or that he recontinueth the Mannors, &c. I have shew-
ed

ed in a former Chapter. I shall in this set out and declare where an Usurpation shall put the rightful Patron out of the possession of the Church, or Advowson, where not.

Usurpation is where a stranger who hath no title to the Advowson, the Church being void, doth present his Clerk to the Bishop or Ordinary, and the Ordinary doth thereupon admit and institute the Clerk presented to the Church which is then void; this presentation is a Disturbance and Usurpation, and doth put the Rightful Patron out of the possession of the Church. And this appeareth by the Statute of Westm. 2. cap. 5.

Cum aliquis jus presentandi non habens, presenterit ad aliquam Ecclesiam, cujus Presentatus sit admissus. For no man can be put out of the possession of an Advowson, but upon Admission and Institution, upon a Presentation onely. For if a Bishop doth Collate unto the Church without title, and his Clerk be Inducted, this doth not put the Rightfull Patron out of possession, as it was adjudged, Mic. 30 Eliz. in Co. Banco, in *Fourdens Case*: For that it shall
be

14. H. 7. 2. acc: be taken only to be provisionally made for the Celebration of Divine Service, untill the Patron doth present.

Pasc. 30. Eliz.
C. B. the
Queen and
Bishop of Yorks
case. Leo. Rep.
226.

Pasc. 30. Eliz. in Co. B. in the Case between the Queen and the Bishop of York, it was holden by all the Justices thus, That Collation cannot gain any Patronage, and cannot be an Usurpation in the case of a common person; *a fortiori*, not against the King: and there it was said, that Collation was the giving of the Church to the Parson. Presentation is the offering of the Parson to the Church: And *vid.* 35. H. 6. 61. The King may gain a Presentation by wrong, although he may not properly be said to be an Usurper or a Disseizor.

§ E. 2. Qu.
Impedit, 168.

At the Common Law, every presentation to the Church did put the Rightfull Patron out of possession of it, and put him to his Writ of Right of Advowson; whether the presentation was by title, or without title; and therefore at the Common Law, if A. being seized of a Manner to which an Advowson was appendant, had levied a Fine thereof to B. and his

his heirs, and afterwards the Church had become void, and A. had afterwards presented by Usurpation his Clark to the Ordinary, who had been admitted, Instituted and Inducted; this should have put the Patron out of possession: and therewith agreeth the book of 8. E. 3. Q¹. Imp. 25. and there it is said that the party must traverse the presentment, and not the Appendancy; for the presentment by the Usurpation put him out of possession, which is the principal matter of title: And so it was, if A. had recovered against B. an Advowson in a Writ of Right of Advowson, and had final Judgement, and afterwards the Incumbent had dyed, and B. by Usurpation had presented his Clark to the Church, who had been admitted and instituted, and afterwards B. had dyed, this should put A. out of possession, and the heir of B. should not have been bounden by the Judgement, either in blood or estate but he should have presented; and the reason of both the said cases was, because every presentation did put the Lawful Patron out of possession, and therefore al-

beit

8. E. 3. Q¹.
Imp. 25.
V. 22. H. 6. 85.
21. B. 4. 105.

45. E. 3. Q¹.
Imp. 139.

Cook 1. part,
Instic. 238.

40 E. 3. Qu.
Imp. 139. acc.

beit in both the said cases, the Usurpation was before Execution; yet the Rightful Patron was thereby put out of possession of his Church, and the Usurper had gained the inheritance of the Advowson thereby, and the presentment of the Rightful Patron *pro hac vice*, lost for ever.

31 E. 1. Qu.
Imp. 186.
6 E. 3. 28.
39 E. 3. 24.
43 E. 3. 15.
50 E. 3. 13. b.

At the Common Law, if an Usurpation had been made upon an Infant, or a *Feme Covert*, they had been put out of possession, and had been put to their Writs of Right of Advowson; and the reason thereof was, because (it was said) the Incumbent came in by judicial act of the Ordinary, *viz.* by Admission and Institution; and it was presumed, that the Ordinary would not have done any wrong, or have assented to any wrong to have been done, which might be to the prejudice of the Church: and so it was, if they had purchased an Advowson, and an Usurpation had been upon them during their infancy or coverture, it had put them out of possession, and they had not been helped by the Statute of West. 2. cap. 5. But yet at the Common Law, if one had usurped upon the

P. 35 M. 6. 60.
1 E. 3. Qu.
Im. 43.
5 E. 3. 50.
42 E. 3. 15.

the possession of the King, and his Clerk had been admitted, instituted and inducted, this should not have put the King out of possession of his Advowson, by reason, *Nullum Tempus occurrit Regi* by his Prerogative; but the King might have recovered his presentment in a *Quare Impedit* brought by him, for that the King was not bounden by the Plenary; and also because that the words of the Statute of Westm. 2. are, *per fraudem & negligentiam*: and so the King out of the said Statute; and yet in such case without a *Quare Impedit* first brought, the King could not have removed the Incumbent out of the Church.

18. E. 3. *Quare Impedit*.
Cook 6. part;
in *Boswells*
Case. acc.

35. H. 6. 60.

A Writ of Error was brought in B. R. to reverse a Judgement given in a *Quare Impedit* in the Court of Common Pleas; The Question there was, Whether a Double Usurpation should put the King out of possession of his Advowson, and put him to his Writ of Right of Advowson; it was there adjudged, that it was. And now Error was brought, and the Error was assigned in the matter of Law: and after many Arguments

Trin. 4 Jac. in
B. R. the King
and *Champions*
case. Cro. 20
part, 123.

P and

38 Eliz. C. B.
Huslies Case.

Pasc. 25 Eliz.
C. B. Tardleys
Case.

47 E. 3. 4 b.
acc.

and Motions made, it was resolved in this case, That the King might maintain a *Quare Impedit*, for that he hath such a priviledge, that as he cannot be put out of the Inheritance of his Advowson, unless by his own grant, so he cannot be of an Advowson. But an Usurpation and Plenary upon it shall bind as to the possession untill he remove the Incumbent by a *Quare Impedit*; and so it was said it was adjudged 38 Eliz. in *Huslies Case*. And although it was said and objected, That in *Tardleys Case*, Pasc. 25 Eliz. in C. B. it was adjudged, That by two Usurpations the King might be put out of possession, and put to his Writ of Right of Advowson. It was said to that Case, That the Record did not mention any induction upon the second presentment; so as there was not any plenary against the King. And *Popham* and *Tanfield* Justices said, That they well remembred that the said *Tardleys Case* was well argued, as if there had been an Induction; But in the Case at the Barr, it was agreed by all the Justices, That the said Double Usurpation (if it was such) should not put

put the King out of possession: and thereupon the Judgement given in the said Case in the Court of Common-Pleas was Reversed.

• If the King hath an Advowson in the right of his Ward, and a stranger usurps and presents, and his Clerk is in by six moneths before the King brings his *Quare Impedit*, yet this Plenarty shall be no good barr against the King; and the reason thereof is, because the King should be otherwise without remedy: For a Writ of Right of Advowson he cannot have, he having an estate in the Advowson but as Guardian; and therefore in that case *Nullum Tempus occurrit Regi*; for else a stranger should hold a thing only by wrong, against him without any ground; yet in that case, the King shall not put out the Incumbent without a *Quare Impedit* brought: For so it is provided by the Statute of 13 R. 2. cap. 11. But if the King hath title to present by reason of Lapse, and the Patron doth usurp, & presents his Clerk who is admitted, instituted and inducted, & then dyeth, the King in such case hath lost his presentation, and shall not have

Stamford 32:
33. acc.

Cook 7. part.
Baskervilles
case.

the second presentation by his Pre-rogative; for there *Tempus occurrit Regi*: and the Kings interest was specially limited, and the six moneths was the substance of this Title.

Cecilia v. part.
Instit. 249.

Upon presentation to an Advowson, the interest of the presenter is to be considered: For in some cases, an Usurpation, although it seemeth to be by Usurpation, shall not put the rightfull Patron out of Possession: and therefore if a man be seized of an Advowson in Fee, and grants three Avoydances unto one man, one after the other, and the Church becomes void, and the Grantor himself presents his Clark, who is admitted, Instituted and Inducted, and afterwards the Church doth become void again, the Grantee shall present to the second Avoydance, for that he was not put out of possession by the first presentment; For the Grantor had the Franktenement and the Fee of the Advowson in him, so that he could not make any Usurpation, to gain any estate to put the Grantee out of possession: and also in respect of the privity of the contract betwixt the Grantor

Grantor and the Grantee, the presentation of the Grantor upon the first Avoydance, though it seemed to be a kind of Usurpation, yet the same did not put the Grantee out of the possession, or the interest which was in him of the two last Avoydances.

If two Coparceners be of an Advowson, and they make composition to present by Turns, and the one of them doth usurp, and presents in the Turn of the other; this usurpation doth not put the other out of possession; And so it is, if two joynt-tenants be of an Advowson, and the one presents his Clark, who is Instituted and Inducted, this doth not put the other out of possession.

22. E. 4. 4.
12. H. 8. 1. in
Kelloway.
6 E. 3. Qu.
Imp. 39 acc.

35. H. 8. Br. 1
370.
17 E. 3. 37. b.
15. E. 3. Dar-
rein present-
ment, 11.
2. R. 3. Qu.
Imp. 102.

In 20 E. 3 tit. Q1. Imp. 63. there two Joynt-Tenants were of an Advowson; and one of them brought a *Quare Impedit* against the other: and counted of an Advowson in common betwixt them; It was there said by *Schard*, that this Writ will not lye; but an Assize of *Darrein presentment* doth more properly lye: But in that Case it was a-

agreed, that the Defendant could not have a Writ to the Bishop, because he did not make title to the Advowson.

Y. 11 H. 4. Qu.
Imp. 119.
27 H. 8. 11.
acc.

But in the Case which before is put, if the Joynt-tenant that presented dyeth, his presentation shall serve for a title in a *Quare Impedit* brought by the Survivor.

If an Advowson be granted to one for life, the remainder to another in Fee, and the Tenant for life dyeth, and afterwards a stranger usurps, and the six moneths pass, in this case he in the remainder was without remedy by the Common Law, for that he could not have a Writ of Right of Advowson: for that Writ was not maintainable but of his own possession, or his Ancestors; and an Assize of *Darrein presentment*, or *Quare Impedit* he could not have, because the six moneths were past: and so although he had the Right of the Advowson in him, yet this usurpation should have bounden him, and gained the possession from him, for that he had not any action for the recovery of his Right. And so it was if a Tenant for life of a Mannor to which an Advowson is appendant

appendant, had suffered an usurpation, and the Tenant for life dyed, he in the remainder had no remedy for this usurpation. And although the words of the Statute of Westm. 2. cap. 5. are, *Habeant eandem actionem & recuperationem per Breve de Advocatione possessorium, qualem haberet ultimus Ante-Cessor.* Yet at this day, I do conceive the Law to be, That they shall be aided by the Statute of Westm. 2. notwithstanding this usurpation upon the Tenant for life.

7 R. 2. *Statbam.* Qu. Imp. 34. it was admitted for Law, That if a Tenant for life suffereth an usurpation, he in the Reversion shall avoid it after the death of the Tenant for life; Notwithstanding that the Book of Mich. 16 E. 3. Qu. Imp. 67. is, That a Purchaser shall not avoid a presentation had against his Feoffor.

45 E. 3. by *Finchden*, if a stranger usurpeth upon any Tenant for life, and afterwards the Tenant confirms his estate in Fee, and the stranger presenteth two or three times, and the Tenant for life dyeth; and afterwards

terwards the Church becomes void, I shall present, and upon any disturbance I shall have a *Quare Impedit*; for the Statute of Westm. 2. being made for to suppress wrong doing, shall be taken largely; and so it was adjudged in the Court of Common Pleas, Pasc. 14. Jac. Rot. 1030. in the Lord Stanhope and Williams case, where the case was, that a Prior did grant the next Avoydance, and the Grantee suffered an usurpation; and it was adjudged, that the Prior himself might have been aided by the Statute of Westm. 2. cap. 5. and had a *Quare Impedit*; and so was the Law taken to be for every Lessee upon an usurpation had upon his Lessor.

Pasc. 14. Jac.
rot. 1030. in
Co. B. Lord
Stanhope and
Williams case.

44. E. 3. Qu.
Imp. 134.

And *vid.* 44. E. 3. Qu. Imp. 134. by Belknap and Finchden, if one be Tenant for life of an Advowson in gross, and a stranger presents, and tenant for life confirms it, & then the Tenant for life dyeth, & the Church becomes void again, he in the Reversion may have a *Quare Impedit*.

7. R. 2. Dars.
present. 2.
20. E. 3. Qu.
Imp. 175.

Again, the time of an usurpation is also considerable; if an usurpation be had upon one to an Advowson

son in the time of War, this usurpation doth not put the rightful Patron out of possession, although the incumbent be instituted and inducted in the time of peace: for the Law respects and looks back upon the original act which is the Presentment; and the same being in time of war, the war doth not only give priviledge to them which be in the War, but to all others within the Kingdom; and therefore although that the admission and institution be in time of peace, yet the presentment being in time of War, the same doth not put the Lawful Patron out of possession: So if an usurpation be upon an Abbot, or Bishop (*sede vacante*) this usurpation shall not prejudice his Successor, but that he shall have a *Quare Impedit*, and thereupon shall remove the incumbent, and shall present, but if such an usurpation had been in the time of his predecessor, this should have put the Successor out of possession, if the six moneths were past.

If the Patron of a Benefice be Outlawed, and the Church doth become

P. Mic. 29.
 Eliz. in Co. B.
 Beverly and
 Cornewals case
 acc. Leon. 1.
 part. 63.

come void, so as the title of presentment is come to the King, in regard of the Outlawry, and a stranger usurps upon the King, and the six monerhs pass, and the King brings a *Quare Impedit* and removes the incumbent, now is the Advowson recontinued to the rightful Patron; and the usurpation whilest the title was in the King, did not gain the inheritance of the Advowson out of the Rightful Patron, but that he after the Outlawry reversed, or pardoned, may present, if the Church doth become void. But yet the Rightful Patron may destroy his own title, and give away his right unto an usurper by his own act, and make the presentation by the usurpation good: as if two men present by usurpation to a Church, and their Clark be admitted, instituted and inducted, the Patron may release his right in the Advowson to one of them, and thereby destroy his own title, and the same is good, and as to the presentment shall enure to the Clark of them both, and shall enure to establish the Clark in the possession of the Church, for that
 the

the Clerk comes in not meerly by wrong, but by admission and institution of the Ordinary, which are Judicial and Lawful acts: and in such case he to whom the release was made, shall not now put out the Clerk, although he hath now better title to the Advowson: But the Clark shall be now said to be in by them both, and his title good, by this release of the rightful Patron.

CHAP. XXV.

What Remedy the Patron hath for to recover his Advowson, or Presentment upon an Usurpation. And of the Writs of Droit de Advowson. Assize de Darrein Presentment, and Quare Impedit.

IF an Usurpation be had upon the Patron of his Advowson, or if he be disturbed in his presentation, the Church being void, the Law hath provided severally Writs & Remedies for the Recovery of the Advowson, and for the removing of the incumbent:

incumbent: The Writs which the Law hath given to the Patron, is either a Writ of Right of Advowson, An Affize of *Darrein* presentment, or a *Quare Impedit*; the first is a Writ for the Recovery of the Right of the Patronage, the other two are Writs concerning the possession.

Mic. 13. Jacob. in Co. B. it was holden, that if a man doth present by usurpation to my Advowson within the six moneths, I may have a *Quare Impedit*: But after the six moneths past, I am put to my Writ of Right of Advowson: so if one usurpeth upon the King, the King is put to his *Quare Impedit* within the six moneths, and upon a double usurpation, he is put to his Writ of Right: *Quere* this case, for that is contrary to the Resolution of the Justices in the case between the King and *Champion*, which before *vide* in the precedent Chapter.

The Writ of Right of Advowson, is a Writ of the highest Nature that the Patron can have: it is such a Writ wherein he may try his Right either by Battail or by Grand Affize:

*W. Glan. H. 6.
cap. 7. lib. 13.
cap. 20, 21, acc.*

Affize: and it lyeth onely for him who hath a Fee-simple in the Patronage, and doth not lye for him who hath but only an estate in tail, or any other inferiour particular estate.

If a man hath an Advowson to him and the heirs of his body, and for want of such issue, to the remainder to him and his heirs, if an usurpation be had upon him, he shall not have a Writ of Right of Advowson; and recover the simple: and that appeareth by the Book of 4. E. 3. 48. by *wilby*, where such a Tenant in tail brought a Writ of Right, and recovered but an estate in tail: But yet such a Tenant in tail may have an Affize of *Darrein Presentment* or a *Quare Impedit* at his Election. And in this Writ the Plaintiff must count either of his own possession of the Advowson, or of the possession of some of his Ancestors. For if a man purchaseth an Advowson to him and his heirs, and afterwards the Church becomes void, and then a stranger that hath no right to present, presents to the Avoidance, and his Clark be instituted and inducted,

21. E. 4. 1.

ducted, and afterwards the Church doth become void again, there the purchaser by this usurpation is put out of possession of the Church, and cannot maintain a Writ of Right of Advowson, because therein he cannot Count of his own possession, or of the possession of any of his Ancestors.

14. H. 6. 15. b.

There is some difference in the form and frame of the Writ of Right of Advowson. For it is to be known, that there is *Advocatio Medietatis Ecclesie*, and *Medietas Advocationis Ecclesie*. *Advocatio Medietatis Ecclesie* is, where there be two Patrons of one Church, and each of them hath right to present a several incumbent; one to the one moyetie of the Church, and the other to the other moyety thereof; and therefore in such case, if an usurpation be had upon any one of them, or he be disturbed in his presentment, he shall have his Writ *de Advocatione Medietatis Ecclesie*, or *Quare Impedit presentare ad Medietatem Ecclesie*: But *Medietas Advocationis Ecclesie* is, where two Coparceners be of an Advowson, and they make composition
pre.

present by Turns, here each of them in truth hath a right but unto the moiety of the Church, for that there is but one incumbent of the same. And if one of them be to bring a Writ of Right upon an usurpation, the Writ must be, *De Medietate Advocationis Ecclesie*. But if one of the said Coparceners at her Turn be disturbed in her presentment, she may bring a *Quare Impedit* upon the same disturbance; and the Writ may be *Quare Impedit presentare ad Ecclesiam*: for that Damages are only recoverable in the *Quare Impedit*; and the Writ is not grounded upon the right of the Patronage; and yet although the Writ be general *presentare ad Ecclesiam*; yet must the Count or Declaration be special according to her title.

33 H. 6. 12.
& 36. acc.
Odingfals case.

Cook 5. part;
102. in Wind-
sors Case.

Note 33 H. 6. 12. & 36. by *Prisort*, a man cannot have a *Quare Impedit de Advocatione Medietatis*, or *de Medietate Advocationis*; For if two have an Advowson in Common, or Joyntly, and one presenteth, the other hath no remedy, because that the presentment is but a personal thing which is intire. And if

two

two Patrons make a Consolidation, or an Union of two Churches, if one be disturbed, he might have his *Quare Impedit ipsum Presentare ad Ecclesiam*, and not *ad Advocationem Medietatis Ecclesie*, or *ad Medietatem Advocationis Ecclesie*.

77. Cook 2 par.
Justit. 364.
38. E. 3. 15.
38. E. 3. 19.
Pr. Droit de
Reffo. 8. acc.

If there be two Patrons of two Churches adjoyning, and the incumbent of one of the Patrons demandeth Tythes in the Spiritual Court against the incumbent of the other: and the one of the Patrons sueth a Writ of *Indicavit* to stop his proceedings there, because the right of the Patronage cometh in question: In that case, the Patron of the Clerk prohibited may have a Writ *de Recto de Advocatione Decimarum*, in this Form, viz. *Precipe A. quod reddat B. Advocationem Decimarum, Medietatis, Tertie, quartæ partis unius Carucat terre, &c.*

Bracton. lib. 4.
246, 247.
Fleta. lib. 5.
cap. 12.
Glanvile l. 6.
cap. 17.

Affize of Darrein presentment, or *Affisa ultimæ Presentationis*, and *Quare Impedit*, are grounded upon the possession; which the Patron upon an usurpation had upon his own possession, or his Ancestors, or upon a special Disturbance, may have and maintain,

maintain; and thereby shall he recover the presentment, and remove the Incumbent who is in by wrong, and recover damages. But yet there is a difference betwixt the Writs of *Darrein Presentment*, and *Quare Impedit*. For 1. Where a man may have a writ of *Darrein Presentment*, there he may have a *Quare Impedit*, but not *e converso*. 2. A man may have a writ of *Quare Impedit*, without alledging of any presentment in a person certain; But a man cannot have an Assize of *Darrein presentment*; but therein he must alledge the presentment in some person certain. 3. A Lessee for years, Guardian, or Tenant at will may have a *Quare Impedit*, but they cannot have or maintain a *Darrein presentment*, because that no person can maintain an Assize; but he that hath a Freehold. 4. If the Husband be seized of an Advowson in the wives right, and a stranger doth usurp, the Husband may have a *Quare Impedit* in his own Name, without the naming the wife in the writ, for that the disturbance is personal, which falls in damage to the Husband: But he

Q

cannot

20 E. 3. *Darrein Presentment*. 13. Old Na. Br. 25.

5 H. 7. 14. by *Farrfax*. 30 E. 14. by *Robert*.

16 H. 7. 63 21 E. 4. 23

14. H. 4. 12.
50. E. 3. 14.

cannot have an *Afsize* of *Darrein* presentment wherein the Advowson is to be recovered, but the Wife must be joyned, and named in the Writ.

In *Afsize* of *Darrein* presentment the Writ doth suppose that the Defendant doth deforce him of the Advowson, and yet in the Count or Declaration he Counts that he or his Ancestors did last present; and the Count although it seemeth repugnant to the Writ, yet it is not so, but is good, and the Count shall not for the seeming variance abate the Writ, because there is no other form of Writ.

34. H. 6. 38.
43. Aff. 21.
13. E. 3. protection 52.
40. E. 3. 1.
11. H. 6. 3.
15. E. 3. Conusans 41.
9. H. 7. 15.
5. H. 7. 16.
Br. Aid. 120.

In these Writs of *Darrein* presentment, and *Quare Impedit*, A protection doth not lye for the Defendant, because of the danger of the Lapse: Neither shall *Conusans* of Pleas be granted in a *Quare Impedit*, because the inferiour Court cannot write to the Bishop to admit the Clark: neither shall a man have aid in a *Quare Impedit* for the danger of Lapse.

Every *Quare Impedit* must be brought against the Patron, the Ordinary,

dinary, and the Incumbent; For if it be brought against the Ordinary and Incumbent only without naming the Patron in the Writ, the Writ shall abate; But yet it stands upon this difference, *viz.* If the Inheritance of the Patron in the Patronage is to be divested by the Judgment to be given in the *Quare Impedit*, then the Patron ought to be named in the Writ; But when the inheritance is not to be divested by the Judgment, but the presentment only to be recovered, there it is not necessary that the Patron be alwayes named in the Writ.

Cook 7. part 3
26. in *Halls* case.

7 H. 4. 25.
3 H. 4. 3.
13 H. 8. 13.
47 E. 3. 11.

If A. hath the Nomination to a Church, and a Bishop the presentation, and the Temporalities of the Bishop come to the King, and afterwards the King doth present without the Nomination of A. and his Clerk is inducted; There the *Quare Impedit* must be brought against the Bishop and incumbent only, for that the King cannot be a Disturber, and the Writ will not lye against him, for that he can do no wrong. But it seemeth, the Bishop must be named in the Writ, for that the incumbent

38 H. 8. Dyer
48.

4 E. 6. petri
Br. 410.

Cook 1. part,
Instit. 344.

9 H. 6. 30, 31.
19 H. 6. 68.

could not come into the Possession of the Church, but by the Admission of the Bishop, and the Bishop may be a special Disturber: And as it is good policy upon every presentation had by usurpation, or other Disturbance, to bring a *Quare Impedit* as speedy as may be: so likewise it is good policy to name the Bishop in the writ, as it was holden by the Justices in the Court of *Common Pleas*, Mic. 3. Jac. in *Lancaster* and *Lows* case: for then he shall not Collate for Lapse, if the Church void during the six moneths: Neither shall the Metropolitan, if the time be come unto him, Collate for the same Lapse; For it is a Rule in Law, That the Metropolitan shall never Collate for Lapse, but when the immediate Ordinary might have Collated for Lapse, and hath surceased his time: And in this case, the Ordinary cannot Collate, because he is made a party to the writ which is brought.

5 H 7. 34.

The Writ of *Quare Impedit* is a Mixt Action, for Summons and Severance lyeth therein; and although the presentment may *inclusive* be recovered

recovered thereby ; yet damages are the principle which is respected in it ; and therefore if the Husband and wife be seized of an Advowson in 50. E. 3. 13. the right of the wife ; if the Church 28. H. 6. 9. acc. be void, and the Husband be disturbed in his presentment to the Avoyd-
 ance, he may have a *Quare Impedit* in his own name, without naming the Wife in the Writ ; for although the presentment be recovered thereby, 22 H. 6. 27. b. yet for the disturbance which is a personal wrong, damages are to be recovered, which shall go to the Husband ; and therefore a release of all Actions personal, is a good barr in a *Quare Impedit* brought by him. 9 H. 9. 57. acc.

If the Plaintiff be Non-suit in his *Quare Impedit* after the appearance, 22 H. 6. 1. the same is a good barr in another 22 H. 6. 46. *Quare Impedit* brought within the 38 H. 6. 14. six moneths ; and the Defendant 24 E. 3. 25. b. upon Title made, shall have a Writ to the Bishop ; and so it is if the Plaintiff doth discontinue his Suit : or if he be made a Knight pendant the Cook 7 part, Writ, the same shall abate the Writ, S. Hugh Portmans case, because it is his own Act : But if the writ doth abate for insufficiency

26 E. 3. Qu.
Imp. 163.
Cook 6. part,
Spencers case.

cy of form, or for false Latine, or misnaming of the Plaintiff or Defendant in it, there the Defendant shall not have a Writ to the Bishop, but the Plaintiff shall have a new Writ by *Journeys Accompts.*

14 H. 4. 12.
30 Eliz. Dyer
279.
37 H. 6. 7.
17 E. 3. bre.
665.

Cook 1 part,
Instit. 198.
3 H. 5. br.
Qu. Imp. 71.

3 Eliz. Dyer
124.

If two Tenants in Common, or Coparceners be of an Advowson, and a stranger doth usurp, so as their Right is turned into action, and they bring a *Quare Impedit*, and six moneths pass, and then one of the Plaintiffs dyeth, the Writ shall not abate, but the Survivor shall recover; otherwise there would be no remedy to redress this wrongful usurpation; but they must joyn in the first Writ; for if the Writ be brought by one of them, the Writ shall abate. But if a *Quare Impedit* be brought against the Patron and the Incumbent, and pendant the Writ, the Patron dyeth, there the Writ shall abate, as it is said in Cook 7. part, in *Halls Case*. But *quere* of that Case. For that it seemeth contrary to the Case in 3 Eliz. Dyer 194. where the Case was, That the Bishop of *Coventry* and *Lichfield*, Patron of two Prebends, granted the next

next Avoydance *alterius coram primo vacante*. Which was confirmed by the Dean and Chapter; the Bishop dyed, and one of the Prebends voided, and the Successor of the Bishop presented, and afterwards the Grantee brought a *Quare Impedit* within the six moneths, and two years after the Issue was found for the Plaintiff, and the Bishop dyed, and yet the Plaintiff had his Judgement, and had a Writ to the Bishop to remove the Incumbent who was presented by the Successor of the first Bishop.

CHAP. XXVI.

Of the Profits of the Rectory, viz. Oblations, Obventions, Offerings and Tythes. And where Suit for Tythes shall be in the Spiritual Court; where in the Temporal Court.

THe Profits and Fruits of the Parsonage or Rectory belonging to the Parson or Vicar besides the Gleab Lands, of which we have before spoken, doth chiefly consist in Oblations, Obventions, Offerings and Tythes. Of Oblations, Obventions and Offerings being meer Spiritual things, and not much touched upon in the Books of our Law, I will forbear to speak at this time; and say somewhat of the Last of them, viz. Tythes; of which there is much said in the Books of the Common Law.

Cook xi. part,
13. in *Pridle &
Nabers case.*
17 E. 6. Dyer
84.
31 El. in C. B.
*Perkins and
Hinds case*
13 judg. acc.

Tythes are an Ecclesiastical Inheritance, Collateral to the estate of the Lands, viz. to take the tenth part of the profits of the Lands, and recoverable onely in the Ecclesiastical

cal Court, They are not extinguished by a Feoffment made of the Lands; by the demise of the Lands, with all Profits and Commodities belonging to the same they will not pass; They are not issuing out of Land as Rent is, Nor can they be extinct by Unity of possession, unless it be a perpetual Unity, as hereafter shall be shewed, all which prove them to be Collateral to the Land.

In Antient time before the Council of *Lateran*, every man might have given his Tythes to what Church he pleased, and have bestowed them upon what Parson he thought best; Or the Bishop of every Diocess might have made a Distribution of them, within his own Diocess; But by a Canon made in the said Council, every man is since compellable to pay or give his Tythes to the Parson, or Vicar of that Parish where they are growing or arising; Now although before the said Council the parties might have granted them at their own Liberties; Or that they might have been distributed as abovesaid: and by the said Canon,

Canon they are now restrained to give or pay them to the Parson or Vicar of that Parish where the Tythes arise, yet did not that Canon make them to be more Ecclesiastical then they were before; But the Jurisdiction of Tythes as well before the said Canon, as ever since did *de jure* belong to the Ecclesiastical Court; For neither Affize or *Precipe* did lye of Tythes, or any other Ecclesiastical duty at the Common Law; and therefore although we find in some Books and Records of our Law, That Suits have been prosecuted in Courts of Lords of Mannors, and in the Kings Temporal Courts, as in particular, Cook 2. part, Instit. 661. A *Scire facias* at Common Law lay of Tythes. Register 165. A Writ of Covenant brought to levy a Fine *de Decimis Garbarum*, wherewith agreeth 38. H. 6. 20. 7. E. 3. 5. by *Parning*; and a Writ of Right of Advowson, *de Advocatione Decimarum Ecclesie*, as is said in 4. E. 3. 27. by *Shard* and *Stoner*, with which agree the Books 8. E. 3. 49. 12. E. 4. 13. 31. H. 8. br. Prohibition 17. Yet the said Suits

Suits were not for them as Tythes meerly, but as Lay-profits apprender, and not as Ecclesiastical duties; and therefore where it appeareth in the Book of 44. E. 3. 5. that an Assise was brought of Tythes, it is to be 44. E. 3. 5. observed in the Book, that the Assise there brought, was of the tenth of all manner of Corn and Grain growing in 100. Acres of Lands, after the Tythes of the Parson were taken, which was but a Lay-Profit Apprender, and no Ecclesiastical Duty.

If Tythes do lye in any Forrest as in the Forrest of *Winsor*; *Rokingham*; *Sherwood*, or other Forrest which is out of any Parish, the King shall have them by his Prerogative: and not the Bishop of the Diocess, or the Metropolitan of the Province, as some have thought: But yet it seemeth by the Book of 22. Ass. 75. That 22. Ass. 75. 66. *Dismes 10.* if there be cause of Suit for such Tythes against the Parties who ought to pay the same, the Suit must commence, and be brought in the Ecclesiastical Court: But if a stranger taketh away such Tythes, then for such Trespass, Suit may be in the

the Temporal Court, as the same may be for the taking away of other goods in the like case; And in some case, actions will lye of Tythes at the Common Law, as it was adjudged Trin. Car. 15. in the Kings Bench, that an *Ejectione firme* will lye of Tythes.

16 E. 3. Qu.

Imp. 147

V. 30 E. 1. in
acc.

38 E. 3. 13. by
Finchden.

Cook II. part,
Dr. Graunss
case.

In 16. E. 3. Qu. Imp. 147. the King brought a *Precipe quod reddat* of the fourth part of the Tythes and Offerings of the Church of St. Dunstons in the West, against a Prior, and it was Ruled that the Writ did lye; but it is to be noted, that the Writ was not brought (as I conceive) against the Prior as a Parishoner who ought to pay the Tythes, but against him as Prior, for taking away the Tythes against Right; so as the Suit was not originally for the Tythes as Tythes, but the wrongful taking and carrying them away. For Tythes set forth are become Lay Chattels, for which the King had his Remedy at the Common Law, if they were taken from him, and by the Common Law, the King was capable of Tythes.

38 E. 3. 20.

In 38 E. 3. 20. A Prior Alien Farmer of the King, was indebted to the

the King for his Farm, and being sued for the same in the Court of Exchequer, he shewed unto the Court, that there was a Parson who held a portion of Tythes which was parcell of the possessions belonging to his Farm; and that the Parson withheld the Tythes from him, so as by reason thereof he could not pay the King his Farm Rent without having of those Tythes which were in the Parsons hands: and upon this a *Quo Minus* issued out of the Court of Exchequer, at the Suit of the King and of the Prior against the Parson, for the paying of those Tythes to the King, and there it was said by *Shipwith*, That of that which concerneth the King, and may turn to his advantage, and may hasten his business, whether the thing be Spiritual or Temporal, the Court of Exchequer shall have the Jurisdiction. But note, That that was by the Kings Prerogative, for that it was agreed, That Suit for Tythes doth not fall into the Jurisdiction of the Kings Bench, or Common Pleas, for that the Right of Tythes is determinable only in the Ecclesiastical Court.

All

All Tythes then being originally Sueable for, and recoverable in the Ecclesiastical Court, let us see how far the Statute of 32. H. 8. cap. 7. hath altered the Law in this point.

After the Statute of 27. & 31. H. 8. of Dissolutions of Abbies and Monasteries : (by which Acts of Parliament, many Advowsons, Parsonages, Vicariges, Pensions, Portions and Tythes came unto the Crown, and were afterwards by Conveyance, or otherwise transferred, and granted over unto Lay persons who were not capable of Tythes by the Common Law) The Statute of 32. H. 8. cap. 7. was made : By which Statute it is enacted, *viz.* That if any person which should have any estate of Inheritance, or Freehold, Term, Right, or Interest in any Parsonage, Vicarige, Portion, Pension, Tythes, or other Ecclesiastical or Spiritual duty or profits, then made Temporal, or which should be suffered to go into Lay mens hands, should be disseized, wronged, or kept out of their Lawfull Inheritance, Rights or Interests to the same; that the persons so Disseized,

Disseised, or wrongfully kept out of their rights or possessions, their heirs, &c. should have recovery in the Kings temporal Courts for the recovery of their rights or possessions by Writs of *Precipe quod reddat*, Assize of Novel Disseisin, Writs of Dower, or other Writs as the Case shall require.

This Statute for these Tythes, Oblations, and other Spiritual profits made Lay fees in temporal mens hands as aforesaid, gave remedy in the Kings temporal Courts; Yet did not this Statute take away the force of the Ecclesiastical Law concerning Tythes: But for not setting forth of Tythes, or for refusing to pay the same, all Ecclesiastical persons who had right before the said Statute to have Tythes, or Oblations, &c. might demand and sue for the same in the Ecclesiastical Court: So as this Statute was an addition unto the Law in respect of the Lay fees, and no alteration or Diminution of that power that the Ecclesiastical person had for his Tythes in the Spiritual Court before the Statute; And upon this Law (as I conceive) was the Case of 7. Ed. 6. in Dyer 83. grounded; where

where an Assise was brought *de libero tenemento de quadam portione decimarum*. And the Case of Pasc. 5. Jacobi. the Countess of Oxford's Case, where a Writ of Dower was brought of predial tythes: for that I have not found, or read in any book of the Common Law, That a woman was dowable of tythes, or that any Assise or Precipe did lye of them as Ecclesiastical duties; for that it is said, in Cook 11. part 13. in *Pridle and Nappers Case*, That a Lay-man could not have an inheritance in tythes at the Common Law; nor did they pass betwixt party and party as other temporal inheritances did: But now, (as I said before) tythes and other Ecclesiastical duties that came to the Crown by the Statutes of 27. and 31. H. 8. of Dissolution, are by these Statutes in the hands of Lay-men temporal inheritances, and shall be accounted Assers, and the husband shall be tenant by the Curtesie, and wives shall be endowed of them, and have other incidents belonging to temporal inheritances: This only Ecclesiastical quality and priviledge they still have and retain, that

that the owner or proprietor thereof may sue for the same for the subtraction of them if he please.

In the nineteenth year of the reign of Queen Eliz. in the Kings Bench, it was disputed, whether Tythes were due *de jure divino*, or by the constitution only of men; and it seemed to the then Judges, That they were as well due by the constitution of Kings; as by the Law of God. This agreeth well with the discourse of the Student in the Book called Doctor and Student, fo. 166. If it was disputed *de quota parte*, for the Student there holdeth, That the tenth part was due only by mans Law; and for to confirm his opinion, he voucheth Gerson the Divine, in his Treatise intituled, *Regule morales*, where he saith, *Solutio Decimarum Sacerdotibus est de jure divino, quatenus inde sustententur; sed quoad tam hanc quam illam partem assignare, aut in alios redditus commutare positivi juris est.* And in another place where he saith, *Non vocatur portio Curatis debita propterea Decima, eo quod sit semper decima pars; imo est interdum vicesima, aut tricesima;* but that Tythes were due *ex jure*
R *divino;*

divino, there was never any question, or doubt; but *de quota parte*, there hath been some question. And although we find in Mr. Fitzherberts *Natura Brevium* 30. that before the Statute of 18 E. 3. right of Tythes was sometimes decided in Temporal Courts, concerning which I have before delivered my conceit, yet did not that make them not to be Spiritual, as before is said; for we see that the Probate of Wills and Testaments did belong unto Lords of Mannors in their Courts, and did appertain to the Spiritual Courts but of later times, as is said in *Cook* 9. part, in *Hensloes Case*, wherewith agreeth *Linwood*, Lib. 5. de Testament; and 11 H. 7. 12. and belonged unto Ordinaries, *ex consuetudine Anglie*, & *non de communi jure*, as is there also said. Yet it is not to be thought or doubted, but that Wills and Testaments, and Legacies therein contained, were esteemed Ecclesiastical, and to appertain to Ecclesiastical Jurisdiction. But Tythes (as I conceive) in themselves (*quatenus* tythes) were ever Spiritual and due *ex jure divino*, and were not accounted as Temporal inheritance; for they could

could not be appendants unto Manors or Lands ; nor were they such things out of which rents and services could be reserved , nor were they transferrable as other temporal inheritances were ; and yet they might have been given in exchange for other temporal inheritances ; for in exchanges it is not requisite that the things exchanged be of one nature or quality, and therefore the exchange of tythes for annuity or rent was good in 9 E. 4. 21. in the Prior of *Sempringhams* Case ; but there it is to be noted, That the same was betwixt Religious and Ecclesiastical persons, and not betwixt them and Lay-men ; for before the Statute of 32 H. 8. cap. 7. Lay-men were no way capable of Tythes in pernacy, as before is said.

9 E. 4. 21. the
Prior of *Sem-
pringhams* case.

If a Parson maketh a lease for years of his Parsonage and Gleab Lands, rendring a Rent for all manner of demands as well Spiritual as Temporal, yet the Lessee shall pay the Tythe hercof to the Parson for that Land, as it was holden, Pasc. 32 Eliz. in Parson *Babbingtons* Case, for that Tythes are due *ex jure divino*, and they cannot be included in the rent ; But *quere* Of

32 Eli. Parson
Babbingtons
Case.
30 H 8. Dy. r
43. 42 E 3.
13. by *Kinton*.

R 2

that

Tr. 38 Eliz.
B. R. *Blinco's*
Case, Cro. 3.
part, 479.

that Case, for that it hath been lately holden and adjudged, Trin. 38 Eliz. in *Blinco* and Parson of *Marstons* Case, which see in Cro. 3. part, 479. that of the Gleab Lands the leasee shall not pay Tythes, because it is parcel of the Church Lands, and *Ecclesiæ Decimas solvere non debet*.

Mic. 6 Jac.
Co. B. *Smiths*
Case.

If Tythes be severed and set forth, and afterwards the Parson leaseth out his Parsonage, without mentioning of the Tythes, the Tythes set forth shall pass; and so it was adjudged, Mich. 6 Jacobi in the Common Pleas in *Smiths* Case; for although they be divided and severed, yet they are (as yet) Spiritual duties of the Parsonage; but if the Tythes be carried into the Barn, and afterwards the Parson leaseth out his Parsonage with all profits, commodities, &c. those Tythes shall not pass to the leasee, for that by so doing they are now become his Lay Chattels.

19 H. 8. 12.
21 H. 7. 21.
9 E. 4. 47, 48.
acc.

If a Parson doth demise his Rectory for years, the Tythes will pass *inclusive*, although the Lease be by word only: But if a Parson leaseth out his Tythes a'one, they will not pass unless the lease be by Deed or Writing, as was

was adjudged, Tr. 26 Eliz. in the Kings Bench in *Withy and Sanders Case*. But that stands also upon a difference; for the Parson may demise his Tythes to the owner of the Land for one year by word only, as it was agreed by all the Judges in B.R. Mic. 2 Car. Rot. Mich. 2 Car. 179. in *Bellamy and Babbthorps Case*; but he cannot demise them to a stranger, but it must be by Deed; and although Tythes will pass to the owner of the soil by contract only, as before is said; yet may the Parson notwithstanding such contract sue the owner of the soil for the Tythes in kinde in the Spiritual Court, and the owner by reason of such a contract shall not have a prohibition to stay his Suit there, as was holden Mic. 8 Jacobi in Co. B. in *Crofts Case*; but the owner may sue the Parson upon the contract in the Temporal Court, and recover as much in damages; but then in his pleading he must not declare of a verbal contract, but must set forth the same to have been made in writing; and so it was holden, Pasch. 7 Jacobi in Co. B. in *Pawlings Case*.

Tr. 26 Eliz.
B.R. *Withy and Sanders Case*.

Mich. 2 Car.
B.R. *Bellamy and Babbthorps Case*.

Mich. 8 Jac.
C. B. *Crofts Case*.

Pasch. 7 Jac.
C. B. *Pawlings Case*.

CHAP. XXVII.

what Persons were capable of Tythes at the Common Law; Of what things Tythes shall be paid, what shall be a good Modus Decimandi for Tythes, and how far it binds the Incumbent and his Successor. And of divers other things concerning the payment of Tythes.

BY this that hath been said, it appeareth, that by the Common Law, a meer Lay-man was not capable of Tythes, nor could any man sue for the same in the Ecclesiastical Court, except he were a Spiritual or Ecclesiastical person. And to that purpose, see 11 Aff. 9. where it is said, That no man shall sue for Tythes but the Parson; and if he joyneth another in the Suit with him, his Suit shall abate.

11 Aff. 9.

2 R. 2. Jurisdiction 37.

In 2 R. 2. Jurisdiction 37. In an Action of Trespasse, the Defendant justified for Tythes in the right of his Master, and pleaded to the Jurisdiction of the Court, and he was forced to answer

answer the Action there, for that the Plaintiff could not have his remedy in the Spiritual Court against the defendant for the said Tythes, nor could the Defendant sue the Plaintiff in the Spiritual Court for the same, but a prohibition would lye, for that he was ^{39 E. 3. 24. a.} not a person able to sue for Tythes there, being a Lay-man; and the right of the Tythes was not tryable in the Spiritual Court, but betwixt Spiritual persons: so in an action of Trespass brought by a Vicar for taking of ^{6 E. 4. 3.} his goods, the Defendant pleaded, That J. S. was Parson of the same Church, and that the goods were Tythes severed, and that he as the Parsons servant took them; the plaintiff replied, That he was Vicar of the same Church, and that he and his predecessors Vicars, had used to have the Tythes as belonging to the Vicarage, and traversed that they were the goods of the Parson; the Defendant demanded the Jurisdiction, because that otherwise the right of the Tythes would in that Action be tried betwixt them; It was the Opinion of the whole Court, That as this Case was, the Court should not be ousted

of the Jurisdiction, because the Plaintiff could not have his Action against the Defendant in the Spiritual Court, nor the Defendant there against him, because they were not both Spiritual persons betwixt whom the right of the Tythes could be tryed in the Spiritual Courts; but in all actions, if it appeareth by the plea in bar of the defendant, or by the plaintiffs Replication, That the right of the Tythes doth come in debate, if the persons be of ability to sue there, the Temporal Court shall be ousted of the Jurisdiction; by which Cases it appeareth, That by the Common Law no person was capable of Tythes but a Spiritual person, nor could any sue for the same in the Ecclesiastical Court, except he was an Ecclesiastical person betwixt whom the right of Tythes was only tryable; but yet at the Common Law, the King being *persona mixta cum sacerdote*, as it is said in 10 H. 7. was capable of Tythes, and his Patentee by his prerogative, as appeareth by the Case of 22 Ass. 75. before cited; where the King having Tythes in the Forrest of *Rockingham*, did by his Letters Patents grant

38 H. 6. by
Fortescue.

35 H. 6. 39.

14 H. 4. 17. a.

grant the same unto the Provost of C. who thereupon brought a *Scire facias* against the Occupiers of the lands within the Forrest to have execution of those tythes, and the Writ was allowed, although the execution was afterwards stayed for some other cause; and the cause perhaps might be for that the said Provost was not an Ecclesiastical person (for there were many Lay Provosts) *ideo quere* that Case and the Record thereof.

Now although a meer Lay-man, Monks who as *Bede* saith were *mere laici*, were not capable of tythes by the Common Law in pernaney, and as to sue for the same in the Ecclesiastical Court; yet by the Common Law a meer Lay-man was capable of a discharge of tythes; and that two wayes: first, by grant of the Parson, and secondly, by composition; for although a meer Lay-man could not, nor can at this day prescribe in *non decimando*, as it is said in Cook 2. part in the Bishop of *Winchesters* Case, and in 8 E. 4. 14. by *Choke*, yet may he prescribe in *modo decimandi* to pay a composition to the Parson in lieu of all

all his tythes; and such composition shall binde the Parson; and although they in the Spiritual Court will not allow of any plea in discharge of tythes in their Courts, as it is said in Doctor and Student 177. and in 8 E. 4. 14. by all the Serjants; yet upon a surmise and supposition of a *Modus decimandi* in the Kings temporal Courts, a prohibition shall be awarded unto the spiritual Court to stay their proceedings, untill the *Modus decimandi* be tryed in the Kings temporal Court.

Mic. 33. Eliz. in the Kings B. in a prohibition sued by the Bishop of *Lincoln* against *Cooper*, who sued him in the spiritual Court for tythes, the Bishop suggested, that he and his Predecessors were seised of the Mannor of D. and that as long as it was in their possessions, had been discharged of tythes; and that the Mannor in the time of E. 6. was conveyed to the Duke of *Somerset* in fee, and afterwards was regranted to the Bishop and his successors: In this Case it was objected, that the prescription was not good *de non decimando*; and if it was good, yet it was interrupted by

by the seisin of the Duke, and although that the Mannor was reassured, yet that the prescription was not revived; But it was resolved by all the Justices, that the prescription was good in the Case of a spiritual person, but not in the Case of a common person; and that in this Case the prescription was not gone by the interruption, for that tythes are not issuing out of lands, neither can unity of possession extinguish them, nor were they extinguished by a release of all right in the land.

*V. Cook 113
part, Pridle &
Nappers case.
acc.*

In 38. E. 3. grants 84. A Prior imperfonce did grant unto I. S. that he should not pay tythe of corn or grain growing upon such lands, and the grant was holden good, and did binde the Prior: so in 38 E. 3. jurisdiction 44. the Prior of R. brought an action against the Abbot of S. and his cosfreers for taking of his corn; the defendants pleaded, that the Prior was Parson of the Town where the corn grew, and that their lands were not tytheable, by reason of a composition made betwixt them and the Prior for the tythes of their lands; and in that Case it was adjudged

*38 E. 3. grants
84.*

*38 E. 3. Juris-
diction 44.*

judged, That if the Action be brought for the tythe of the Land, that the composition pleaded will be a good bar to the action. And it appeareth by the Register, fol. 38. that a man may be discharged from the payment of Tythes by composition made with the Parson or Vicar, and it is usual, as by many Cases herein after it shall appear.

Now although it be agreed, That a meer Lay-man cannot prescribe in *non decimando*, not to pay any Tythes at all, for that such a prescription would be against the Law of God, Tythes being due *ex jure divino*: yet the opinion of the Student in his discourse of Tythes, Doctor and Student 167. is, That a County may prescribe to be quit of the Tythe of Corn and Grass, so as the Vicar or Curates have sufficient portions besides to live upon; but if one man of a Town would prescribe to be discharged of Tythe of Corn and Grass, such a prescription would be utterly void, unless he did shew, that he did recompence the Parson or Vicar some other way; but one man in a Town may prescribe to pay a certain pension to the Parson or Vicar

Vicar yearly in lieu and contentation of all his Tythes; and such a prescription hath been adjudged good, Mich. 40 Eliz. in *Pigot and Hearn's Case*; and *vide* Mich. 15 Car. in B.R. where it was adjudged, that a hundred might prescribe in not payment of Tythes, upon the reasons aforesaid; but a Parish or a particular Town cannot prescribe in *non decimando*.

A Spiritual person may prescribe not only in *modo decimandi*, but also in *non decimando*, not to pay any Tythes at all; and lands may be discharged of Tythes in the hands of Spiritual persons, and now since the Statute of 31 H.8. in the hands of the Kings Patentees, by suspension, privilege or unity.

The Bishop of *Winchester* prescribed, That he and all his predecessors there, Farmers and Tenants had holden a Mannor, and the demeasnes and the Lands thereof exonerated, acquitted and discharged of and from the payment of Tythes; and the prescription was adjudged good, and that it was good as well for his Tenants and Farmers as for himself.

If a Parson purchaseth a Mannor 30 H.8. Dyce
43.
or

or land in a Parish whereof he is the Parson, the tythes of this Mannor and lands are suspended whilst the Mannor, and Lands, and Parsonage remain in his own hands or occupation, because he cannot pay tythes to himself; but if afterwards he maketh a feoffment in fee of the said Mannor or Lands, or leaseth them out for years unto another, there the purchaser or lessee shall pay tythes to the Parson, & he shall have tythes of the Lands against his own feoffment or lessee, for that tythes being due *ex jure divino*, must be paid unto whose hands soever the Mannor or Lands come, unless they come to the Parson himself; or unless the Parson to whom the same do come, can plead to be discharged from the payment of tythes for the said Mannor or Lands by some special privilege.

An Abbot and his Covent, or a Prior and his Covent, might have been discharged from the payment of tythes; but if all the Monks had dyed, and the Abbot and Prior also, so as there had been a dissolution in Law of the Abby, or Priory, if the Lands

Lands had come to other persons; the occupiers or owners of the Lands should have paid tythes, as it was adjudged Mic. 11. Jacobi in the Court of Common Pleas, in the Dean and Chapter of *Windsor* Case.

The Cisterrians, Templers, and Hospitallers by their Order were to defend the Christians against the Infidels, and had a privilege granted unto them by Pope *Adrian* in the Council of *Lateran* (which privilege was restrained only to those three Orders; and of which Orders our Laws only took notice of) *ut decimas prediorum suorum quae in manibus suis propriis excolant non tenentur solvere*, which must be so averred, as it appeareth by Cook in his new Book of Entries, f. 542. This was but a special privilege for the Lands in their own Manurance, for the maintenance of Hospitality, and had many restrictions: as first, It extended only to such lands as they had at the time of the said Council, and for so long time only as the same remained in their own possessions: but if lands had been purchased by them after the said Council, the immunity for such lands did

*p. 15. Eliz. in
Harpers Repo.*

did not extend to them, as it was said, Pasch. 16 Jacobi in C. B. in *Potter and Bathersts Case*; and so it was if lands had escheated unto them after the said Council; the priviledge did not extend to such lands; for it was but a special priviledge, and was therefore to be taken strictly, as it was adjudged in *Hodysons Case*, 8 Car. which Case see in *Claytons Reports*, 181.

The Abby of Fountains was of the Order of the Cisterians, and 11. *Johannis* before the Council gave Lands to one *Kerby* to hold of them by fealty, &c. and afterwards in 36 E. 3. those Lands did escheat unto the Abby: It was resolved in this Case in the Court of the Common Pleas in *Sir Thomas Dickensons Case*, that for those Lands so escheated Tythes should be paid, like unto the Case of 29 E. 3. *Quinzim* 1. where Lands are holden of an Abby discharged of the payment of *Quinzim*, and afterwards the same Lands come to the Abby, the Abby shall pay *Quinzim* for those Lands.

See Hill. 1 Car. in an Attachment upon a prohibition between *Dickenson* and

and *Greenhow*, which Case see in *Pop-
hams Reports* 156. Those who were
of the Order of the *Præmonstraten-
ses*, claimed the priviledge to be dis-
charged of Tythes; which they said
was granted unto them by the Pope,
but was never confirmed by any Act
of Parliament in this Realm; it was
for part of the possessions of the Ab-
by of *Cockerman* in *Lancashire*, which
afterwards was surrendred and came
to King *Hen. 8.* It was a Question,
If this grant of Priviledge was good
or not? It was much doubted of, and
not resolved by the Justices; for it
was said, That it appeareth by the
Book of 11 H. 4. That the Pope
could not by his Bulls, Councils, or
Decrees alter the Laws of the Realm;
It was much insisted upon for the
allowing of this priviledge unto them
for that, that this Bull of the Pope
granted unto them was confirmed
unto them, 24 of King *John*: and
that it appeareth in a Record 22 E. 1.
Rot. Membrana 5. That the King
took them and their Immunities into
protection; and that in 22 R. 2.
John of Gaunt having *jura Regalia* in
the Countrey of *Lancaster* confirmed

this Bull unto them likewise, and for these reasons it was strongly urged, That those of the said Order of *Præmonstratenses*, were at the time of the said Statute of Dissolution *de facto* discharged of Tythes, though it was not *de jure* a good discharge within the said Statute of 31 H. 8. Quere, for the Case was not resolved by the Justices.

And that the Lands which the houses of those religious Orders before mentioned purchased after the said Council of *Lateran*, or which afterwards escheated unto them, were not privileged, appeareth by the Statute of 2 H. 4. cap. 4. whereby it is enacted, That the Religious houses of the Order of the Cisterrians, which had purchased Bulls to be discharged of tythes, should be in state they were before, and that against those that took advantage of them process of *Premunire* should be awarded: by which Statute it appeareth, that they intended to have discharged the lands of Tythes which came to them after the said Council, but that the Lawes of the Land would not allow of such Bulls for discharge, or extend the privilege

priviledge unto other Lands then what they had in their own Manurance at the time of the said Council. 2. The priviledge was but special for the Lands in their own Manurance; for if they had leased out those Lands to Farmers for rent, if it had been but for years or at will, yet the Farmers or occupiers of those Lands should have paid tythes; for by the leases the lessors had admitted the occupation of the Lands to be in the leasees; for upon such possessions they might have maintained actions of Trespass; and so was it adjudged 10 Jacobi in the Common Pleas in *Jaggard and Huttons Case*. 3. The priviledge was but special, and did not extend unto new erections upon lands which were priviledged. And whereas by the Law, and the ancient constitutions of the Church, of ancient Mills Tythes were not paid: but by the Statute of *Articuli Cleri*, cap. 5. for Mills newly erected Tythes shall be paid; it was adjudged Trinit. 14. Jacobi in the Kings Bench in a Case of Prohibition; That where a Parson did Libel in the Spiritual Court for the Tythes of a Mill which was erect-

V. 18 Eliz.

Dyer 349.

Cook 2. parts 44.

*3 H.8. K. 143
May 163.*

ed upon Lands discharged from the payment of Tythes by force of privilege within the Statute of 31 H. 8. that a prohibition would not lye in the Case, for that *de molendino novo erecto* Tythes should be paid.

Unity of possession of the Parsonage and Lands which should pay Tythes by Appropriation or otherwise in the hands of Religious and Ecclesiastical persons had discharged them from the payment of Tythes; and now at this day by the Statute of 31 H. 8. cap. 13. such an unity of possession in the hands of the persons of such religious houses, shall be a discharge for the Kings Parsonage from the payment of Tythes for the lands that came to the Crown by the said Statute: but then such an unity in the said Religious and Ecclesiastical persons, must have been *justa, equalis, libera, perpetua*, as it is said in Cook 11. part, in *Pridle* and *Nappers* Case. For if either the Parsonages, or the Vicariges Lands or Tythes, had come, or had been united unto their houses by disseisins, or other tortious and unlawful acts, such an unity had
not

not been a good discharge within the said Statute. 2. It must have been *equalis*, there must have been a Fee-simple both in the Lands and in the Tythes, or Parsonage, *simul & semel* in them; for if the Abbots, Priors, or other Religious persons had held but by Lease, that had not been such an union as the Statute intended. 3. It must have been *libera*, free from the payment of Tythes; for if their Farmers, Tenants at will, or years, had paid Tythes, that had not been a sufficient unity to have discharged them from the payment of Tythes. And lastly, It must have been *perpetua*, time out of mind; and then for the infinite impossibility and impossible infiniteness, that such immunities and discharges that such Religious persons and houses had before time of memory, could not be known; such an unity had been a good discharge in their own hands, and at this day such an unity is a good discharge for the Kings Patentees, within the Statute of 31 H. 8.

In 17 Eliz. in the Kings Bench, the Case was; An Abbot held a Parsonage Improprite which was

discharged of Tythes, and he purchased parcel of the lands, so as the tythes thereof were suspended in the hands of the Abbot; afterwards the possessions of the said Abby came to the King by the Statute of 31 H. 8. of Dissolutions: the question was, whether the Lands so purchased by the Abbot before his surrender of them to the King upon the Statute, were discharged of Tythes: in this Case it was the Opinion of Mr. *Plowden*, That they were not discharged: For he said, That no Lands were discharged, but such as were lawfully discharged by right composition, or other lawful thing; and in the said Case the Lands were not discharged in right, but suspended only during the time that they were in the Abbots hands. *Quere*, for the Case was not resolved.

Mich. 33 Eliz. in the Kings Bench, *Nash* and *Allens* Case. In the Case of a Prohibition the party did Surmise, That the Lands were parcel of the Priory of *Cree-Church*, which came to the Crown by the Statute of *Dissolutions*, and that the Prior held them discharged of tythes at the time of the disso-

dissolution, upon which Issue was joyned: It was moved in this Case, That there was not any discharge set forth, as by composition, unity of possession, priviledge of order, &c. But it was the Opinion of the whole Court, That although that the special manner of the discharge was not set down in the pleading, yet the Court ought intend it to be a lawful discharge as composition, &c. for that the King should hold as the Prior held, and it ought to be taken that it was a lawful discharge *tempore dissolutionis*.

But such Lands as came to the Crown by the Statute of 27 H. 8. of Dissolution, shall at this day pay Tythes, although that the lands in the hands or occupation of the said religious houses were discharged from the payment of tythes; for that the priviledges being personal priviledges, were extinguished by the said Statute of *Dissolution*; and there are no words in the said Statute of 27 H. 8. to save the priviledges; and the Statute of 31 H. 8. being a subsequent Law, had no retrospect to those priviledges, and so it hath been adjudged in all

V. Sir Marmaduke Strick=
Lands Case.
1639. at the
Assises at York
adjudged ac-
cordingly.
V. Claytons
Reports 117.
And v. 12. Car.
there adjudged
acc. in another
Case.

the Courts at *Westminster* by all the Judges of *England*, viz. 15 Jac. in Co.B. in *Garret and Wrights Case*, and 7 Car. in the Kings Bench in *Clark and Wards Case*.

Tythes then being meer Spiritual things, due *ex jure divino*, recoverable onely (as Tythes) in the Spiritual Court, and payable by all persons, unlesse discharged by prescription, suspension, privilege or unity: Let us now see of what things Tythes shall be paid, and of what not; and what shall be a sufficient composition or *modus* paid in lieu of Tythes, and how long and how far such composition or *modus* shall bind the present Incumbent for the Tythes.

All Tythes are Prædial, Personal, or Mixt; Prædial Tythes are such as increase yearly of the ground, such as are Corn, Grain, Grass, Hopps, Saffron, Wood, Hemp, Flax and other profits arising meerly of the Ground; and these may be distinguished into *Decima Majores*, & *Decima Minores*, or *Minuta Decima*; *Decima Majores* do belong to the Patson onely: But *Minuta Decima*, such as Saffron, Wood, &c.

do

do belong unto the Vicar, as hath been adjudged, Pasc. 38. Eliz. B. R. in *Beding* and *Feaks Case*: and Mic. 1. Car. in Co. B. in *St. Richard Udall* and the Vicar of *Attons* case. Personal Tythes, are those that are paid of the profits of such things as are gained by the Industry of Man, Mixt Tythes, are those that are called Prædial Mediate, as Calves, Lambs, &c. which come not immediately of the ground, but proceed of things maintained out of the ground: of all these sorts Tythes shall be paid, but with this *Proviso* or Limitation, that the party who is to pay the same, have a property in them: For of things which are *feræ naturæ*, and of which a man hath not any absolute property, or of things which are meerly for pleasure, Tythes shall not be paid, and therefore of Apes, &c. Tythes shall not be paid.

Tythes shall be paid of Partridges and Pheasants, but they are not Prædial, but personal; so it is of Conies taken in a Warren, and of Doves in a Dove-house.

If a man stealeth Conies out of a Warren

a Warren, or Doves out of a Dove-house, he shall not pay Tythes of them, because he is not the Lawfull Owner of them, and the Law gives him no propriety in them, and the Rightfull Owner of them, shall not pay Tythes of them, because he hath not the profit of them.

Hill. 16. Jac. in B. R. in a Prohibition between *Daudridge* and *Johnson* Parson of *Buckfield*: the case was, A. Parson libelled in the Ecclesiastical Court for Tythes of a Fulling-Milk, and suggested, that the Defendant the Miller fulled every week forty Cloathes, and did gain for every Cloth 2. s. wherefore he demanded the Tythes of them; In this Case a Prohibition was granted by the Court, for that by the Law of the Land he ought not to pay Tythes of them; nor were Tythes to be demanded of such Mills; For of such things as come only by the labour of Man Tythes are not payable, but of things renovant only.

Tythes shall not be paid, of Quarries of Stone, Tyle, Brick, Lyme, Gravel, Clay Chalk, so it was adjudged, Mic. 19. Eliz. in B. R. and Pasc.

Pasc. 34. Eliz. in Co. B. in *Liff* and *Pasc. 34. Eliz.*
Watts Case, for that these are par- *C. B. Liff and*
 cel of the Inheritance, and the Par- *Watts Case.*
 son or Vicar have Tythe of the Grass *Cro. 2. p. 277*
 or Corn growing upon the same *Register 55.*
 Lands, and the Land shall not pay *Br. Dismes 18.*
 a Double Tythe : and *vid. 20. Eliz.*
 by *Wray*, and all the Judges, that *20. Eliz. B. R.*
 Coals are not Tytheable, and *by Wray.*
 therefore that a Prescription *de non*
Decimando of them is good.

Tythes shall not be paid of After-
 pasture where tythes have been paid
 before of the Grass of the same
 ground, unless that by covin there be
 left more Grass standing upon the
 ground with an intent to deceive the
 Parson, then there hath been wont to
 be left; and so was it holden *Mic.*
6. Jacobi in Co. B. in *Smiths Case*; *Mic. 6. Jac.*
 and so it is of the rakings of Corn or *C. B. Smiths*
 Grain, as it was likewise adjudged *Case.*
Mic. 7. Jac.
 by the Law of *Moses*, none ought to *C. B. adjudge.*
 rake their Grattens, but ought to *Cook 2. part.*
 leave them for the Poor and Or- *Instit. 652. b.*
 phans, and the Law will not give to
 the Parson or Vicar Tythe of that
 which is appointed for Almes.

Tythes shall be paid by the In-
 keeper

Tr. 16. Car.
B. R. Richard-
son and Cabells
Case. Paph.
143.

keeper of Pasture of his Guests Horses;
 But if the Innkeeper takerh a Cropp
 of Hey, & afterwards puts his Guests
 Horses into the grounds to pasture,
 Tythes shall not be paid : Trin. 16.
 Car. in *B. R. Richardson and Cabells*
Case, adjudged accordingly.

Mic. 15. Car:
in B. R. Skyn-
ers Case,
adjudg acc.

Tythes shall not be paid of the
 Roots of a Coppice Wood grubbed
 up, but by Custome.

Pal. 7. Jac. in
Co. B. ad-
judged acc.

If Lands lye fallow every se-
 cond or third year, the same is a
 Charge to the Owner or Tenant for
 that year, and an Advantage to the
 Parson or Vicar in the bettering the
 Cropp the year when the same is
 sowed with Corn or Grain; and
 therefore although the Grass, and
 feeding of the Fallow ground be
 for that year some small profit to
 the Owner of the Soil, yet he shall
 not pay Tythe for the same: and
 therefore if barren Cattel be kept
 upon the Fallow, or upon the Stub-
 ble, no tythe is due for them: But if
 the Land be Tytheable, and the Te-
 nant thereof will not plough or ma-
 nure it, to prevent the Parson or Vi-
 car of this Tythe which might arise
 of

of the same ; it was holden by *Barkley* Justice, 15. Car. in the Kings Bench, that the Parson might sue the Tenant for Tythe of it in the Ecclesiastical Court: But *Quere* of it.

15. Car. in B. R. by *Barkley* Justice,

Tythes shall not be paid for beasts of the Plow or Husbandry: But if a man keepeth Cattel upon his Grounds until they be ready for the pail, and afterwards selleth them, and makes profit of them, tythes shall be paid for them: Mic. 8. Jac. in Co. B. *Baxter* and *Hopes* case adjudged accordingly; and *vid.* 2. Car. in B. R. in *Pophams* Reports 197. where it is said by *Whitlock* Justice, *De animalibus inutilibus*, the Parson shall have the tenth of the Bargain for depasturing, as Horses, Oxen, &c. but *de animalibus utilibus*, he shall have the tenth *in specie*, as Cows, Sheep, &c.

Mic. Jac. in Co. B. *Baxter* and *Hopes* case.

The Parson of a Church libelled in the Spiritual Court for the tythes of a Riding Nag: the Case was this. A man let his Land, reserving the running of a Horse at some time when he had occasion to use him there; It was said by the Court in this

Tr. 15. Jac. in B. R. *Lauking* and *Wildes* case *Paph.* 126.

V. Tr. 9. Jac. in
B.R. Potbill
and Mayes
case adjudged
acc. Bolstred
1. par. 171.

Hill. 15. Jac.
C. B. Hyde
and Ellis case.

this Case, that nigh London a man will take a hundred or two hundred Horses to grass; and if he should not pay tythe for them, the Parson should be defrauded; But it was said, that if the Defendant did prove it was a Nagg for labour, and not for profit, then in such Case a Prohibition would lye, otherwise not.

If Underwood be employed for the fencing of the Corn which is sowed upon the Land for the preserving of the pasture from spoyle by Cattel or otherwise, the Parson shall not have tythe of it, as it was adjudged, Hill. 15. Jac. in the Common Pleas, in *Hyde* and *Ellis* Case: and if there be a Parson and Vicar in one Church, and the Vicar hath tythe Wood, and the Parson hath the tythe of the Pastures, and Wood is Felled and Employed in the making of the Fences, and for the Inclosure of the Pasture ground from the hurt of Cattel, there the Vicar shall not have tythe of the Wood which is felled for the same Inclosures, as it was holden also in the same Case.

If Wood be cut down and
employed

employed for Hoppoles, where the Parson or Vicar have tythe of the Hopps, they shall not have tythes of the Wood which is felled for the Hoppoles; as it was holden in *White and Bickerstaffs Case*, Mic. 15. Jac. in the Common Pleas: and it was there said by *Hobart* Chief Justice, that if a man hath a great Family, and much Wood is cut down and spent, and burnt in his house keeping, that tythes shall not be paid of such Wood.

Mic. 15. Jac.
C. B. *White*
and *Bickerstaffs*
Case.

Trin. 4. Car in Co. B. in *Nortons and Farmers Case*, It was moved, to have a Prohibition for to stay a Suit in the Spiritual Court for tythe Wood, upon surmise that the Wood was spent in his house for firing, and shewed, that the Custome of the Parish is, that the Owner of any House and Land in the said Parish who pay tythes to the Parson, ought not to pay tythes for Wood spent for fewel in their houses; the issue being joyned, upon the Custom, it was found for the Defendant: It was moved in stay of Judgement, that although it be found that there is no such Custom, that they ought not

Tr. 4. Co. C. B.
Norton and
Farmers Case

not to pay tythes for Wood spent in their houses; yet *per legem terræ* they ought to be discharged of the same: But it was resolved by the whole Court, that it is not *de jure per legem terræ*, that any be discharged of them. For it is usual in Prohibitions to alledge Customes; Or by reason of other Lands whereof he payes tythes, that he is discharged of that kind of tythes, but not to alledge that *per legem terræ* he is to be discharged; and the Plaintiff in the Prohibition in this case having alledged a Custom, the same being found against him, it was adjudged for the Defendant, and for that Cause only the Prohibition was denied, and Consultation awarded.

Mr. Fitzherbert in his *Natura Brevium* 53. is, that no tythe shall be paid for Agistment of Cattel: But now the Law is taken to be otherwise, and so was adjudged Mic. 38. Eliz. in Co. B. in *Gryfman* and *Lewes* Case: which see Cro. 3. part 44. and it shall be payd by the Owner of the Lands, and not by the Owner of the Cattel: and the reason thereof is,

is, for that the Parson or Vicar may not know whose Cattle they are, and therefore the best shall be taken for the Church, and that which is most certain, and therefore the tythe for them shall be paid by the owner of the soil who agists the Cattle; and so it was agreed by *Foster* and *Cook* Chief Justice, in their argument of *Baxter* and *Hopes* Case, Mich. 8 Jac. in the Court of Common Pleas.

Mic. 8 Jac. in
Co. B. *Baxter*
and *Hopes* case.

If sheep dye after they be shorn, before the Feast of Easter next following, tythe shall not be paid of the Wooll of those sheep. 1. Because they are but of small or no value, & *de minimis non curat lex*. And, 2. Because that the owner of the sheep hath paid Tythe for them the same year, and there shall not be a double tythe paid for one thing in one year, as before is said. 3. Tythe shall be paid of the clear profit only, but if the sheep do dye before the Feast of Easter, all the profit of them is lost; and therefore for to demand tythes of them, were but *afflictionem addere afflicto*. And Tythes shall not be paid of the Pelts or Fells of sheep which dye of the rot without a spe-

cial custom so to do; and so it was adjudged, Trin. 3 Car. in the Kings Bench in a prohibition, betwixt *Ash-ton* and *Willer* Vicar of *Kilmoufden* in the County of *Somerset*, where the Vicar libelled in the Spiritual Court for the Tythe Wooll of sheep which dyed of the rot, and a prohibition was awarded; But quere of the first of these Cases, for by Mr. *Fitzherbert* in his *Natura Brevium*, Consultation 51. g. The Parson by prescription may claim Tythe of Wooll of the sheep of the Parishioners, killed and dying from Mich. to the Feast of *Easter*, and may sue for the same in the Ecclesiastical Court: *ideo quere*; and shall have a consultation, if a prohibition in such Case be awarded.

A Custome was alledged to pay Tythe in kind for sheep if they continue in the Parish all the year, but if they be sold before shearing time, then to pay but *ob.* for every sheep so sold; it was in this Case holden by the whole Court to be a very unreasonable custom; for in such Case the Parson should be defeated of his Tythes. Pasch 17 Car. in Co. B. in *Weeden* and *Hardens* Case. See Mich:
2 Car.

2 Car. in B. R. in *Pophams Reports*, Mich. 11 Jac. in C.B. *Sherringtons Case.*
197. acc. 2 Eliz. Dyer 170.

If ground be barren *suapte natura*, Tythes shall not be paid of it; but if ground be barren, and tythe wooll and lamb have been paid for the same by the space of thirty years together, and afterwards by manurance and the labour of man the same is made fertile, and doth bear corn and grain, the owner of the Lands for seven years shall pay such tythe for the same as he paid before: but if a Marsh or Meadow by accident, by inundation, or by ill husbandry, be over-run with thorns, bushes, &c. yet the same is not barren ground, but the Parson shall have tythe of it, as was holden Hill. 38 Eliz. in the Kings Bench in *Sherrington and Fleetwoods Case.*

Tythes shall be paid of Heath, Furs and Broom, unless the party setterth forth a prescription or a special custom not so to do, that time out of mind there hath been paid milk, calves, &c. for the Cattle that have been kept upon the same Lands; for then tythes shall not be paid of the Heath, Furs, or Broom; and so it was adjudged, Mich. 29 Eliz. in the Kings Bench.

Hill. 88 Eliz.
B.R. *Sherrington's & Fleetwood's Case.*
V. 15 Car. in B.R. *Sugden and Cottels Case*, acc.

Mic. 29 Eliz.
in B.R. adjud.

11 H. 4. 89.
30 E. 3. 10.

Of Trees of the age of Twenty years growth or above, which are timber trees, tythes shall not be paid : but of *Sylva Cedua* and Underwoods, tythes shall be paid, but not of great Trees by the Statute of 45 E. 3. cap. 3.

Now what shall be said to be *Sylva Cedua*, and what timber trees, hath been a question, both by the Canon and Common Lawyers, *Linwood*, l. 5. fol. 26. *Decima de sylvis ceduis, ut de frumento persolvantur, circa quæ minus quam circa fructus agrorum laboris imponitur. Et ibidem declaramus provisione concilii sylvam ceduam illam fore quæ cujuscunque generis existens arborum in hoc habetur ut cedatur, & quæ etiam succisa ex stipitibus & radicibus renascitur.* And *Belknap* 50 E. 3. 10. In *sylva cedua* is included all manner of wood which is able to be cut, and which by good keeping may grow again.

The mis-interpretation of these words (*sylva cedua*) gave occasion to Parsons and Vicars in the time of King E. 3. to sue for tythes of great trees and timber trees under the name of *sylva cedua*: for the Declaration

and explanation of which the Statute of 45 E. 3. cap. 3. was made, by which it is said, Whereas the great men and Commons sell their woods at the age of twenty years, or of greater age, to Merchants, to their own profits, or in aid of the King in his Wars, Parsons and Vicars do implead them in the Spiritual Court for the Tythe of the said woods by the name of *sylva cedua*; it is ordained, That a prohibition in this Case shall be granted, as hath been used before this time.

Now 50 E. 3. 10. by *Belknap*, it was never seen, saith he, that of great trees or of timber trees, tythes were demanded; which the Court agreed; and by Cook 11 part, 48. in *Lisford's* Case, The words in the Statute of 45 E. 3. and the Book 50 E. 3. viz. (great trees) must be intended, Ash, Oak, Elm, of all which as well before the Statute of 45 E. 3. by the Common Law, as since, if they were of the age of twenty years growth, tythes was not to be paid, because they of their nature were only accounted timber trees, and fit for building: but of Swallows, Willows, Maples, and the like, although that they be above

Plow. Com.
450. Doct. and
Stud. 196.
Cook II. part,
Lifords Case.
800.

the age of twenty years, yet Tythes shall be paid.

It hath been a question, Whether Beeches are Timber-Trees, and whether Tythes shall be paid of them? But the better Opinion hath been, That they are not Timber-Trees, and that Tythes shall be paid of them, except where by the custom of the Country where there is scarcity of wood, they be accounted Timber Trees; for there no Tythes shall be paid of them; and so upon this difference it was adjudged, Pasc. 16 Jacobi in the Common Pleas in *Pinder and Spencers Case*.

If a great Wood doth consist for the most part of Underwoods which are tytheable, and some great Trees or Beeches grow here and there sparsh therein, Tythes shall be paid of the whole wood, unless they be especially excepted, as was adjudged, Trinit. 19 Jacobi in the Kings Bench: and so if the wood doth consist of the most part of Timber Trees, and there is some small parcel of Underwood or Bushes growing in the same Wood, the priviledge of the great wood and Timber Trees shall priviledge the residue of the Wood from Tythe to be paid

paid thereof, as it was said by *Warbar-*
ton, Justice, it was adjudged 16 Jac.
in Co. B. in *Leonard's Case*.

4 Eli. in B.R.
Foster & Leo-
nards Case.

Cro. B. part 1.
acc.

Co. 11. part,
48. in *Lifords*
Case.

If Timber Trees have been usually
topped and lopped, Tythes shall not
be paid of the tops and loppings; for
the Law that priviledgeth the body
of the Tree, doth priviledge the bran-
ches of the same Tree; so if a timber
Tree become *arida, sicca, nec portans*
fructus, nec folia in estate, nec existens
Maremium, yet because sometimes it
was an Inheritance which was dis-
charged of Tythes, although that now
it become a dottard, Tythe shall not
be paid of the same; for the quality
remaineth, although the state of the
Tree be changed.

Cook 11. part,
in *Bowles case.*

Tythes generally and originally
are not payable of houses for habita-
tion, nor of any rent reserved upon
any demise of them; for tythes are to
be paid of things which grow, or re-
new every year by the act of God;
and for the houses in *London* Tythes
anciently were not paid; for the pro-
fits of the Churches in *London*, con-
sists only in Oblations, Obventions,
and Offerings: But now by a Decree

Cook 11. part,
16. D. *Grants*
Case.

made in the year 1535. and confirmed by Act of Parliament made 37 H. 8. cap. 12. the Parsons in *London* have 2 s. 9 d. in every pound of rent for the tythe of the house; but if a *Modus decimandi* be alledged to pay 12 d. in every pound of rent for every house in such a Parish in *London*, this is a good *Modus Decimandi*; for it may be, that for the Lands upon which the houses have been built, such a *Modus decimandi* time out of mind hath accustomed to have been paid.

Tr. 8 Car. in
B. R. the Earl
of *Desmonds*
case adjudged
acc.

V. Cro. 1. part,
192. acc.

15 Car. in
B. R. adjudged
acc.

By the custom of the Realm Tythe shall be paid for Fish taken in the Sea, but the tenth Fish shall not be paid, but some small sum of money in consideration of a tythe: but if the Fish be taken in a pond, or in a several piscary, and not in the Sea, or any open River, then the owner shall pay tythe thereof as a Predial tythe was ought to be set forth within the Statute of 2 E. 6.

To pay a Buck or a Doe, or the shoulder of a Deere when a Deer is killed, may be a good *Modus decimandi* for the Tythe of a Park, as it was adjudged Mich. 5 Jac. in Co. B. and Mich.

Mic. 11. Jac. in Cc. B. in *Cooper and Andrews Case* : and although afterwards the Park be disparked, and the land converted into tillage, or hop-grounds, yet the Parson shall not have tythes in kind, but the *modus* shall remain: so it is, if all the Park pale falleth down, which is a disparking in Law of the Park, yet the same doth not destroy the *modus*, for that the same may be a Park again; but *Quere* of this Case. For the difference hath been taken where the prescription goeth to so many acres of lands, and where to the Park by the name of a Park; for in the first Case the *modus* continueth, but not in the last if it be disparked; see to that purpose, Pasc. 19 Jacobi in the Common Pleas in *Poole and Reynolds Case*, where it was adjudged accordingly.

A prohibition was prayed upon a suit in the spiritual Court, for tythes in kinde of a Park now converted into tillage, upon surmise of a *modus decimandi* to pay a Buck or a Doe for all tythes, and the prohibition was granted; in which Case these points were resolved. 1. That although that

that they are *feræ naturæ*, yet they may be given for tythes. 2. Although they are not tytheable of themselves, yet they may be given for a *modus decimandi*. 3. That this is a discharge of the very suit, and the Park is not but a Liberty, and the owner may furnish it with game when he pleaseth; and so it was holden Hill. 6. Jac. in Co. B. in the Vicar of *Clares Case*: Vide *Sharp and Sharps Case*, Noy. 148.

13. Car. at the
Assizes at York,
Thursbies case,
V. *Claytons*
Reports, 21.

In 13. Car. at the Assizes at York, *Thursbies Case* was this, viz. Suit was for tythes of Corn growing in a Park which was then disparked; the defendant did plead a custom to pay Venison and a Horse pasture time out of mind in satisfaction of all tythes, &c. Evidence was given that Corn had been sowed there and reaped, but no tythes paid; but the witnesses proved a Buck paid yearly, but could not tell whether it was out of this Park or not; the Jury found, if it was paid out of any Park, if it was accepted and allowed; it was the better to uphold the custom, then if particularly tyed to pay a Deer out of this Park; for now, if the Park be dis-

parked,

parked, yet this payment of the Deer may be performed ; otherwise it had been, if the custom had been to pay a Deer out of this Park only; for then by the destroying of that the custom had been gone also ; in this Case it was holden by the Judges, although the Deer had been often, and for the most part paid out of this Park, yet this doth not alter the custom, if it may be paid out of any Park : and if the custom was to pay a shoulder of Venison generally, it may come out of any Park ; but the Judges directed the Jury, that if they found the Deer was to come out of this Park which is now disparked, then to find a special verdict.

If a custom be alledged, that the Parson shall have but the tenth sheaf of Wheat for all the tythes of all manner of Corn and Grain, this is no good custom, as it was adjudged 38. Eliz. in the Common Pleas: so in the Case betwixt *Jucks* and Sir *Charles Candish*, Mic. 11. Jac. in Co. B. it was alledged, that the Owners of such a Farm had used time out of minde to take back thirty sheafs of the tythe Corn after the same was set forth, to their

their own uses; it was the opinion of all the Justices, that it ought to be alledged, that the Farm was a great Farm; for otherwise the custom would not be good, for that it tended to the impoverishing of the Parson or Vicar, in taking away of a good part of the profits.

In debt upon the Statute of 2. E. 6. A prescription was made to pay one load of Hay for all Hay growing in such a Close; this prescription was disliked of by the Judges, as where payment of one penny is pleaded in satisfaction of 20 l. but upon the evidence, it was not proved that the load of Hay was paid constantly; but sometimes money, sometimes 5 s. sometimes 6 s. as the parties could agree; the Jury found for the plaintiff against the prescription, and it seemed to the Judges, that the prescription should not be good to pay a load of Hay, because of the charge of the making of it, and also of the loading of it, if it was the usage so to do: v. 13. Car. at the Assize of York, *Jacksons Case*, *Claytons Reports* 60. *Case* 103.

But if a man soweth his lands with
Corn,

Corn, and afterwards the heir maketh a Composition with the Parson or Vicar to have but the thirteenth Sheaf for his tythe, this was holden to be a good Composition, and should bind the Parson: and if afterwards the heir doth endow his Mother of the third part of the Lands, the Mother shall have benefit of this Composition, although that she cometh in paramount to the same.

In 17. Car. in the Kings Bench, *Hitchcocks Case* was this: A. Vicar did Contract by these words, *viz.* (*Inter se convenerant*) with a Parishoner to pay so much for increase of Tythes, and dyed; His Successor sued in the Ecclesiastical Court for them: and in this Case a Prohibition was granted; For it was said this was not a real Composition, although the Bishop called it so, but a personal agreement only; and in this Case it was said, that if it was a Real Contract, and made between Spiritual persons, and only concerning Spiritual things, it was sueable only at the Common Law, and should not bind the Successor.

Pasc. 17. Car. in B.R. Hitchcocks Case.

Pasc. 21. Jac. in
B. R. Snell and
Bennets Case.

A Parson did Covenant with A. his Executors and Assigns, that for 10. s. to him paid every year by A. his Executors or Assigns, that he, his Executors and Assigns should be quit of the tythes for such Lands during the life of the Parson. A. paid the Parson 10. s. which he accepted of. Afterwards A. made B. an Infant his Executor and died. Administration *durante minore etate* of the Infant was Committed to another who leased the Lands at Will; the Parson libelled in the Spiritual Court against the Tenant at will for to have tythe in kind of the Lands; it was adjudged in this Case, that he should have a Prohibition, for that the Agreement and Composition did bind the Parson during his life; and although the Assignee could not sue the Parson upon the Contract; yet he should have a Prohibition to stay his Suit in the Ecclesiastical Court, and put the Parson for his remedy for the 10 s. upon the Contract; for he could not have tythes in kind, because of the Composition.

P. Pasc. 16 Jac.
in B. R. Ful-
der and Grif-
fins Case, acc.

Every *Modus Decimandi* is by Prescription, and is intended to have a Lawfull

Lawfull Commencement upon some agreement at the first made for valuable Consideration with the Parson or Vicar; and therefore although that tythes in kind hath been paid for twenty or thirty years together, yet the same shall not destroy the *Modus*: And *vid.* 44. Eliz. in B. R. in *Novel* and *Hicks* Case: Cook 2. part Instit. 653. When a Custom doth Create an Inheritance, it cannot be waved or annulled by payment, or other matter in Paile, *vid.* acc. 15. E. 3. title Judgement 133. 14. E. 3. *ibid.* 155. And it was agreed in Doctor and Student, that if it were ordained by Law, that payment of tythes in kind should cease, and that every Curate should have assigned unto him such a portion of Land, Rent, or Annuity, as should be sufficient for him; Or that every Parishioner should give a certain sum of money for the maintenance of the Curate, that such a Law would be a good Law: And then if tythes may be so changed by a positive Law into Rent or Annuity, there is no question to be made; but a Composition made with the Parson or Vicar to

'pay

Mich. 6 Jac. in
Co. B. Mild-
mans and Hic-
tons Case, ad-
judged, acc.

Mic 44. Eliz.
B. R. *Novel*
and *Hicks* case,
Co. 2. part,
Instit. 653.

15. E. 3. Judge-
ment 133. &
155.

8 H. 6. 22, 23.
 9 H. 6. 17.
 41 E. 3. 27.
 17 E. 3. 11.
 12 H. 4. 13.
 19 H. 6. 75.
 34 H. 6. 36.
 31 H. 6. 28.
 35 H. 6. 5.
 26 H. 8. 7.
 27 H. 8. 20.
 B. 21. 4cc.

pay a *Modus Decimandi* which hath continued time out of mind, Custom being equivalent to Law, is good and shall bind the Parson and his Successors: But a *Modus Decimandi* cannot begin at this day; but must be by Prescription: But yet at this day, a Composition may be made which shall bind during the life of him that made it, as it was agreed, Pasc. 17. Car. in *Hichcocks Case* above mentioned.

13 Car. in B.
 R. Setons case.

In an Action of Trespass a Prescription was layed, that 2. s. 9. d. had been paid for eleven Doles of Meadow; the Case was, That these eleven Doles were parcel taken out of a great Meadow; and the Witnesses did prove, that a third part had been paid for every Dole of the whole Meadow, of which the eleven Doles were parcel. In this Case, it was adjudged against the Plaintiff, because he laid his Prescription entire, and several thirds for every Dole, though it did amount to so much; and thereupon the Plaintiff was Nonsuit.

In a Prohibition a Prescription was suggested to pay a rate tythe of

13. s.

13 s. 4 d. for all Land, &c. and for the profits of a Mill, upon Evidence, the Witnesses proved severall small sums paid, as 5 s. 2 s. &c. which in the whole came to the just summe in the Prescription; this was holden to be no good proof of the Prescription by the Owner of the Inheritance; But otherwise it had been, if these several summes had been paid by the several Tenants of several parcels of the Lands in question; and in this Case it was holden, If such a Prescription is laid for an hundred Acres, and the Plaintiff faileth in the number, *Quere* if it be not a failer of the Prescription; therefore it was conceived the best way to lay it was, That it had been paid for such Closes, &c. by name. And it was further cleerly holden in this case, That there being no proof made which did extend to the Mill, that the Plaintiff did fail in his prescription in all.

15 Car. Sit
Arthur Robin-
sons Case,
Claytons Re-
ports, f. 31.
Case 135.

The proper Court, for the Parson or Vicar to sue in for his Tythes not paid, or withholden from him by his Parishioners, or for the profits of his Church taken from him by

u

another

another Parson or Vicar, is the Ecclesiastical Court by a Libel there preferred against them, or by a Spoliation.

38 H. 6. 20.
by *Fortescue*.

26 H. 8. 3.

If one Parson taketh away the Tythes or profits belonging to the Church of another Parson: If the Tythes or profits do amount to a fourth part of the value of the Church, he shall have a Spoliation against him in the Spiritual Court, although they claim by several Patrons: and if they claim both by one Patron, there one shall have Spoliation against the other, although the profits do amount to above a fourth part, as to a third part, or the moyetie of the Church, because in that Case the Patronage doth not come in debate: But if the profits do amount to above a fourth part, and they claim by several Patrons, there if one Parson sueth a Spoliation against the other in the Spiritual Court, the party grieved (which is the Patron) shall have an *Indicavit* (which is in the Nature of a Prohibition) unto the Spiritual Court, because the right of the Patronage doth come in debate. But where the
Right

Right of the Tythes doth only come in debate, and not the right of the Patronage, there the Spiritual Court shall have the Jurisdiction of it: and therefore in an Action of Trespasse brought by a Parson against a Vicar for underwood, and each of them did claim the Underwoods by Prescription as his Tythes, there although their claim was by Prescription (which was a matter tryable at the Common-Law); Yet because the Right of the Tythes was in debate only, the temporal Court was ousted of the Jurisdiction.

22 E. 4. 24.
Mich. 29 Eliz.
in B.R. ad-
judged acc.
35 H. 6. 39.
acc.

Spratt Sub-Dean of Exeter did Libel in the Spiritual Court against *Nicholson* Parson of A. *pro annuall pensione* of 30 l. out of his Parsonage, and shewed in his Libel, how that *tam per realem compositionem, quam per antiquam & laudabilem consuetudinem, ipse & Prædecessores sui habuerunt & habere consueverunt prædictam annualem pensionem* out of his Parsonage of A. and in this Case it was adjudged, That although he claimed the same pension by Temporal grounds, *viz.* by Prescription and real Composition; yet because the parties were both *Spiri-*

Mich. 10 Jac.
in Go. B. *Spratt*
and *Nicholson*
Case.

tual persons, he had his Election to sue for the same either in the Spiritual Court, or in the Temporal Court. And the Statute of 34 H. 8. cap. 16. gives liberty to Spiritual persons to sue for pensions in the Spiritual Court: But if a Spiritual person who hath such a pension by prescription, bringeth a Writ of Annuity for the same (as he may do if he will) and declares upon the prescription, he cannot afterwards sue for this Annuity in the Spiritual Court, by the name of a pension; for that he hath determined his Election, and if he doth, a Prohibition will lye.

See 35 Eliz. in *Croker and Dorners Case*, in *Pophams Reports* 23. where it was holden by all the Justices, That a pension issuing out of a Rectory, is the same with a Rent: and that such a Pension was demandable by the Common Law, in the Common Law Court; and by that Case it appeareth, That such a pension was demanded in a Writ of Entry, whereupon a Common Recovery was had.

And so if a Parishioner shall refuse
to

to pay his Tythes, or doth not set forth his prædial Tythes, the Parson may Libel against him in the Spiritual Court if he please; Or else at this day, the Parson or other Proprietor of the Tythes, may have their Action in the Kings Temporal Courts, for the not setting forth, or for the subtraction of them at their Election, and shall recover the treble value of the Tythes, as it was adjudged by all the Judges of *England*, against the opinion of *Egerton* Lord-Keeper, 29 Eliz. in *Woods Case*. For although that the treble value be not given to the Parson or proprietor of the Tythes by any express words in the Statute of 2 E. 6. Yet forasmuch as he is the party grieved, and hath the right of the Tythes in him, the treble value is given to him. For whensoever a Statute giveth a forfeiture or a penalty against any one who wrongfully detaineth, or dispossesseth another of his Right or Interest, in that Case, he who hath the wrong, shall have the forfeiture or penalty, and shall have his Action at the Common Law for the same, or else he may sue in the

M Cook 2 parts
Inst. 650 b.
Hill. 40 Eliz.
in Co. B. 101.
699 *Bedills*.
Case acc.

Ecclesiastical Court for the same cause.

In 17 Car. in the Common Pleas, the Case was this, A. Parson Libelled in the Ecclesiastical Court for tythes, and set forth, That the Tythes were set forth, and that the Defendant did hinder and stop him to carry them away: It was holden by the Justices in that case, That because he did not sue upon the Statute, for he doth not mention the double value in his Libel as he ought to do, as was agreed by all the Justices, a Prohibition in that Case was awarded.

Now, what shall be said a setting forth of the Tythes, and what not, appeareth by the Judgement given 10 Car. in *Andersons Case*; where it was holden by all the Justices, That if a Parishioner setteth forth his Tythes, and they stand upon the Land two or three dayes, and afterwards he taketh and carrieth them away, that this is not a setting forth of the Tythes within the Statute of 2 E. 6.

Pasch. 15 Car. in the Kings Bench,
In an Action brought upon the Statute
of

of 2 E. 6. and found for the Plaintiff, it was moved in Arrest of Judgment, because the Plaintiff said, That the Defendant was Occupier only, and did not shew what Interest he had; But it was the Opinion of the Justices and the whole Court, That he needs not so to do; for that whosoever taketh away the Tythes is a Trespasser: and an Action lyeth against a Disseisor for the Tythes: and that if one curteth them, and another carrieth them away, an Action lyeth against any of them.

If a Parson or other Proprietor of the Tythes will sue for the same in the Ecclesiastical Court, for the not setting forth, or the subtraction of them, after they are set forth, he shall recover in that Court but the double value of the same; and the reason thereof is, because in the Ecclesiastical Court he shall recover the Tythes themselves; which makes it equivalent with the treble value at the Common Law, as it is said in Cook 2. part, Instit. 651.

And therefore the Case was, Hill. 11 Jac. in the Court of Common-

Hill. 11 Jac. in
Co. B. *Baldwin*
and *Girryes*
Case.

Pleas; That a Parson did Libel in the Spiritual Court for the subtraction of tythes, and the defendant in the Court of Common Pleas suggested to be discharged of Tythes by priviledg within the Statute of 31 H. 8. and had a Prohibition: And Issue being joyned in the Court of Common Pleas upon the Priviledge, the plaintiff in the Prohibition was Nonsuit. Whereupon a Consultation was awarded, and a sentence was afterwards given for the Parson in the Spiritual Court, That he should recover the single value, and set the value certain; *Et ulterius quod recuperet duplicem valorem*, and set the same also certain. And after this sentence a Prohibition was awarded, because therein they exceeded the value which was to be recovered in their Court; And it was adjudged, That although their sentence was not, that he should recover the treble value; yet because Sentence did amount to so much being laid together, a special Prohibition was Awarded, setting forth the whole matter at large.

And a Parson shall have an Action upon the Statute of 2 E. 6. for the

the Treble Value, or may sue in the Spiritual Court for the double value at his Election, although he be no Parson at the time of the Action brought: For if a Parishioner doth not set forth his tythes, or substracteth them after they are set forth, and afterwards the Parson is deprived for Symonie, or other crime, and so declared by a sentence given in the Spiritual Court against him; yet may such a Parson after such his Deprivation sue in the Ecclesiastical Court for the substruction of the tythes which were due to him before his Deprivation, & a Prohibition will not lye, as it was adjudged, Hill. 13. Jacob. in *Coles Case*.

And thus much briefly of tythes, the profits of the Church or Parsonage belonging to the Incumbent; let us now come to speak somewhat of Churches Collegial and Parochial, either Presentative, or Donative; And how, where, and by whom an Union may be made of two Churches into one, and of the Appropriations of them, and of Advowsons.

CHAP.

CHAP. XXVIII.

Of Churches Cathedral, Collegiall and Parochial, Presentative, or Donative; Of Visitation of them: Of Proxies incident to Visitations, and of the Union of Churches, and of the Appropriations of them, and Advowsons.

ALL Churches are Cathedral, Collegial and Conventual, or Parochial: A Cathedral Church is the See, or Church of the Bishop of the Diocese, whereof he is the Incumbent.

Dodd. 5. acc.

Coo. II. p. 71.

17. Aff. 29.

40. E. 3. 28.

Of every Cathedral Church there is a Dean and a Chapter, who are the Prebendaries or Canons thereof, who are of Council with the Bishop: But they have and hold their possessions severed and divided from the possessions of the Bishop: The Visitation of Cathedral Churches doth belong unto the Metropolitan of the Province, or else to the King, when the Temporalties of the Archbishop of the Province, *sede vacante,*

cante, are in the Kings hands.

Collegial Churches or Conventual, were such as in times past, were belonging to Abbies or Priories, and the like, and such as are at this day in Collidges.

A Parochial Church is that *Ad quam Ecclesiam Plebs convenit, ad percipienda Sacramenta Baptismatis & Corporis & Sanguinis Christi, unde pabulum ad animas sustentendas suscipiant*: of which the Parson, of whom we have before spoken at large, is Incumbent, who hath the Cure of all the Souls within the Parish.

In a Church Parochial, there are other Officers besides the Parson and Vicar, viz. the Church-wardens, Parish Clark &c. The Church-wardens are a Corporation, who have a capacity to take goods into the use of the Church; and the Government of the body of the Church doth appertain unto them; they shall have an Action of Trespass for taking away the Goods and the Ornaments of the Church in their own Names: and also shall have an Appeal of Robbery for the goods of the Church, which are stolen out of the Church;

Cook 1. part.
Instit. 3. 2.
13. H. 7. 10. 2.

37. H. 6. 30.

3. E. 2. Trin.
Kinc.
Lib. Abridg.
Ass. 76.

8 E. 4. 6.
13 H. 7. 10.
acc.

Cook 1. part,
Instit. 3.
12 H. 7. 29.

Church : and if they do recover damages in any Action brought by them as Church-wardens, the damages shall go to the use of the Church, and they shall not have them to their own uses. But the Church-wardens have not a Capacity to purchase Lands to the use of the Church: Nor is any Lease made by them of the Churches Lands good in Law.

The disposing and placing of the Parishioners in Seats in the Body of the Church doth appertain to the Ordinary *de communi jure*; and by appointment from, and under the Ordinary, to the Church wardens; and for a Seat in the Church, the Suit doth properly belong unto the Spiritual Court. But if a Custom be alledged, that the Church-wardens themselves in their own Rights time out of mind, without the power of the Ordinary, have used to have the placing of the Parishioners in Seats *Navi Ecclesie*, this is a good custom, and for such a Seat the Suit shall be at the Common Law, and not in the Ecclesiastical Court, because the Ecclesiastical Court cannot try the Custom, as it was adjudged 9. Car.
in

in the Kings Bench, in *Tompsons Case.*

If a Gentleman with the consent of the Ordinary, hath built an Isle to the Chnrch, and set convenient Seats there for him and his Family, and hath alwayes repaired the same at his own costs and charges; if the Ordinary place another man in the Seat with him, without his consent, he may have his Action upon the Case against the Ordinary; But if with the consent of the Ordinary a man builds or sets a seat in *Navi Ecclesie*, and another mans pulls down the same, or defaceth it, an Action *Vi & armis* will not lye against him, because the Freehold of the Church is in the Parson; but in such Case, he may sue the party in the Spiritual Court for the wrong done unto him.

Mich. 10 Jac.
in Co. B. Pym
and Garvens
Case.

The Church-wardens are at every Visitation of the Bishop of the Diocess to make presentment of all Misdemeanours and Offences in the Parson, Vicar, or Parishioners, either concerning Religion, or the breach of the Rites and Orders of the Church, and for to present the defaults of all that repair not to Divine Ser-

Service there, or observe not the Rites and Ceremonies of the Church: and although they have so large an Authority in the Parish under the Ordinary; yet they are not esteemed to be Ecclesiastical persons, but they are for the most part Lay-men, and they may be removed from their Offices by the Ordinary upon just cause of complaint made unto him, or else by the Parishioners themselves; and therefore if a Parish doth pre-
 26 H. 8. s. b. scribe to have the choice of their Church-Wardens for two years together with the assent of the Parishioners, yet may the Parishioners themselves within two years remove such Church-wardens, and appoint others in their places; otherwise they might waste all the goods of the Church within the two years, for which the Parishioners could have no Remedy against them.

The Parish Clark is an Officer in the Church; but he is most commonly a Lay man, and no Ecclesiastical person, and his Office is but a Lay-Office; He is to be chosen by the Parishioners, and not by the Parson or Vicar alone, and he is also removeable

moveable upon Cause from his Office at their Wills and Pleasures: He is not a person corporate, nor hath succession, and the Parson is not tyed to find the Parish Clark, as it was adjudged, Hil. 30. Eliz. in B. R. in *Saul and Woods Case*; But if the Parson be tyed to find such a Clark, A Prescription to pay 5. s. per an. or such sum to such a Parish Clark by a Parishioner in discharge of his tythes, is a good discharge of the tythes against the Parson: But yet tythes are not payable to him as tythes: And that he is but a Lay-person, and removeable as aforesaid, appeareth by the Book of 3 E. 3. Annuity 40. where an Annuity was granted unto a man untill he was promoted unto a Benefice; and in a Writ of Annuity brought by the Grantee, the defendant did alledge, that the Plaintiff was made by him the Clark of such a Parish Church; and it was ruled to be no good plea, to barr him of his Annuity: for that the Clark of a Parish was but a Lay-Officer, and he was removeable at the pleasures of the Parishioners; and the Clarkship was no Benefice within

Hil. 30. Eliz.
B. R. *Saul and
Woods case.*
Leon. 1. p. 968

Pasch. 8 Jac. in
Co. B. Cundick
and Plomers
Case.

within the intent of the Grant. So likewise was it adjudged in the Case of a Prohibition; where the Parishioners of the Parish of *St. Alphege* in *Canterbury* did prescribe to have the Election of their Parish Clark, and by a Canon made 1 Jacob. the Election of the Clark was given to the Vicar: It was adjudged in this Case for the reasons before ailedged, That the prescription should be preferred before the Canon; and so much the rather, because by the Prescription no more was claimed, then by the Law of the Realm was due and usual; and a Prohibition was awarded accordingly.

Charches Collegial, Conventual or Parochial, were alwayes Visitable by the Bishop of the Diocess, if no special Exemption was made by the Founders of the Ordinaries Jurisdiction in the Visitation thereof. And so were all Abbies, Priories, and other Religious Houses; and the Bishops, or other Visitors had anciently Proxies allowed them for their Visitations, which was a certain Exhibition of Provision in *Esulentis & poculentis* in the time of their Visitations.

A Proxie is called *Procuratio*, and ought to be *secundum qualitatem personæ Visitantis, & substantiam Visitatorum*. But when the pomp of the Visitors did require such provisions as were intolerable both to Incumbents of Churches, and to Religious houses whereof they were the Visitors, every Church & Religious House was reasonably taxed; and the Proxies for Provisions were reduced into certain sums of monies, which were paid yearly into the Nature of Pensions to the Ordinaries who had the power to visit them.

Upon the Dissolution of Abbies and Monasteries, Proxies were not extinguished, although the Visitation did cease: neither were they extinguished by Unity of possession in the hands of the King, but suspended onely: And when the Abbies and Priories, and the Land out of which the Proxies were paid by Grants from the King, came unto Lay-men, then were those Proxies revived, and at this day they are due and payable out of all Impropriations unto the Ordinaries, although the Visitation doth cease; And all other Churches Pre-

sentative do at this day pay a certain sum of money to the Ordinary for a Proxy for his Visitation.

Proxies do agree with tythes in some things ; for as the Instruction of the people in the Service of God, was the first Cause of payment of tythes : so Visitation which (as Mr. Littleton saith) doth alwayes accompany Instruction, was the first Cause of Proxies ; and as no Layman can prescribe in *Non Decimando*, as before is said, so according to the Rule of the Canon Law, *Nulla est adversus Procuracionem Præscriptio*.

But if a Parochial Church be Donative (as the same may be) and exempt from all Ordinaries Jurisdiction, there the Ordinary shall not visit the Church, but the Patron by Commissioners appointed by him ; and there it seems Proxies shall not be paid ; for that Proxies are Spiritual duties, which had their originall by the Canon Law, and were due only to Ordinaries and Ecclesiastical Visitors, and were recoverable only in the Ecclesiastical Court, and were not due or payable to Lay-

Lay-Patrons, or such their Visitors.

If the King doth Found a Church or Chappel, he may exempt the same from the Ordinaries Jurisdiction; and then the Lord Chancellor of *England*, or the Lord Keeper of the Great Seal for the time being, shall visit the same.

20 E. 3. Er 2
commeng. 9.
21 E. 3. 60.

And if the King by his Letters Patents do Licence a common person to found a Church or Chappel, exempt from the Ordinaries Jurisdiction, the same shall be Visited by the Founder, and not by the Ordinary. And if such a Clerk Donative be disturbed in his Incumbency, the Patron or Founder shall have a *Quare Impedit presentare ad Ecclesiam*, and declare upon the special matter: But if the Patron of a Church Donative doth once present unto the Ordinary, and his Clerk be Admitted and Instituted, it is now become presentable, and it shall never be Donative after, and then the Ordinary shall visit the same, and a Proxie shall be paid, and Lapse shall incur to the Ordinary, as it shall do in all other Benefices presentable.

6 H. 7. 4. by 1
K. ble.
8 Aff. 29.
F. N. B. 42. 20.

Cook 1. part 3
Instit. 344.

22 H. 6. 26.

50 E. 3. 27.

40 E. 3. 28. 3.

Dr. & Stud:
116.

By the Common Law, if two Churches be so poor, and of so small Revenue that the Incumbents cannot live, and maintain their Charge out of the profits of them, the Ordinaries, Patrons and Incumbents may make a Consolidation or an Union of the two Churches into one, and then upon the Union, it must be appointed who shall present next after the Union, one of them, or both of them, or Joynly, or severally by Turns; and upon such union and agreement made by Instruments, or Writings under the hands and seals of the Patrons, Ordinaries and Incumbents, each of the Patrons if he be disturbed, may have a *Quare Impedit Presentare ad Ecclesiam*; and although by the union, the Incumbency of the one Church be lost and extinguished, yet the Patronage doth remain still in being; and therefore if an Annuity be granted out of the Church of D. and afterwards the Church of D. is united to the Church of S. if the Grantee doth release to the Patron of the Church of S. the Annuity is not thereby extinct; But a Release to the

the Patron of the Church of D. will extinguish the Annuity.

Every Union must be made by the Ordinaries, with the Consent of the Patrons, by special words of *unire*, *annectere*, *consolidare*, or the like, and must be perpetual: For an union of a Church for life or years is not good.

It hath been some Question, whether at the Common Law, an Union might be made of one Church or Chappel to another Church or Chappel, without the Kings Licence or Consent. And I do conceive that it might be; For the union is the Act of the Ordinary; *Unio est actus spiritualis*, and as one saith, *Munus Episcopale est unire, quia tota Diocesis est Cura Episcopi*: and the Licence of the King is not so necessary in the Case of union of one Church unto another, as the same is in the Appropriation of Churches, or Advowsons; and I find in our Books, that in Cases of Union, the Licence of the King is not pleaded, but it is said onely, that the union was made by the Patrons and Ordinaries, or *concurrentibus his qui in lege requiruntur*.

34 E. 3. 24.
Imp. 1976

12 H. 8. 8. by
Eliot.

cur: In 11. H. 7. 9. the Chappel of *Wanborow* was united unto *Magdalen* Colledge in *Oxford*, and it was pleaded, that the Union was by the Patron and Ordinary, but it is not pleaded to be with the Licence of the King: And so in 9. Eliz. Dyer. 219. The Parish Churches of *Illefeld* and *St. Martins* in the County of *Southampton* were united by the Ordinaries, with the Consent of the Patrons, but it doth not appear that there was any Licence of the King.

It is certain, that no person can Found any Church, Chappel, or Colledge without the Kings Licence, as appeareth by the Case of 7 E. 6. Dyer 18. where Pope *Urban* at the request of the Baron of *Greystock* Founded a Colledge of a Master and six Priests, which was Certified in the Book of the First fruits by the name of *Restorium & Collegium de Greystock*: yet because it was agreed, that the Pope could not found or incorporate a Colledge within this Realm, nor assign, nor Licence any to assign lands to the same, but the same must be done by

by the King himself; it was adjudged, That the Foundation was void; and although the Colledge had the Countenance of a Lawful Colledge and Foundation, yet it was no Colledge within the Statute of 1 E. 6. of Chauntreys.

But if one Church or Chappel be united unto another without the Kings Licence, yet the union is not void (as I conceive) for these causes; 1. The Parson, Patron and Ordinary at the Common Law might have aliened the possessions of the Church, or have charged the same without the Kings Licence; *a fortiori*, they might unite two Churches in one; for that the King lost nothing thereby. 2. If an Advowson holden of

21 E. 3. 5. by
Shard.

a common person, be appropriated without the Kings Licence, it is no forfeiture of the Advowson, but the King shall present upon the avoidance *Nomine distictionis tantum*, untill a Fine be paid unto the King for the Alienation in *Mortmain* without Licence; but it doth not make void the Appropriation. If then in that case, the Appropriation be not avoided, *a fortiori* an union shall not be avoid-

ed, which is less than an Appropriation, although it be without the Kings Licence. 3. The right of the King to present to the Church is only for Lapse, which is but a Casual and a Collateral right; and therefore an union made without the King of two Churches into one, by the Common Law may be good, and stand good.

By the Statute of 37 H. 8. cap. 21. it is enacted, That whereas there are many poor Parishes within one mile of another, the tythes and revenues whereof are not sufficient to maintain the Curate, & for the maintenance of the Reparations, Ornaments and duties belonging to the Church, that an union or consolidation of two such Churches may be into one, with the consent of the Ordinaries, Lawfull Patrons and Incumbents by Writings under their hands and seals. In that Statute there is no mention made of the Licence of the King to be had, or that the union must be with his consent, which if the consent of the King had been necessary, I conceive the makers of that Law would not have omitted;
and

and the King doth not lose any thing by such union; For that all Tithes, and First fruits of Churches or Chappels, united according to that Statute, are thereby saved and reserved to the Crown.

Trinit. 9. Car. in the Common Pleas, in the case between Dr. Row-
lins and Sir Henry Taxley for the Church of *Bomthorpe* in the Countrey of *Norfolk*, The Question was, whether the said Statute of 37. H. 8. did extend to a Church Parochial only, or to other Churches; and whether by that Statute a Parochial Church might be united to a Church Collegiate without the Kings Licence: I did not hear that the Question was ever Resolved, or that any Judgement was given in that case: and therefore I will not take upon me to determine it. But in all cases of union of Churches, I conceive it to be the safest and surest course to have and obtain the Kings Licence, or consent, although that it be after such union made; for that perhaps will be sufficient: For so it was holden to be in the Case of 11. H. 7. 9. For there, after the union made, the
King

King granted his pardon, which was holden to be a subsequent assent, and sufficient to make the union good : And so it was adjudged, Trin. 37. Eliz. in Co. Banco. in *Austin* and *Twines* case, that the Confirmation by the Kings Letters Patents, of an union made of the Parish Church of *Asbe* unto the Deanery of N, after the union made, was sufficient. .

Now although that one Church or Chappel may be united unto another Church or Chappel both by the Common Law, and by the Statute of 37 H. 8. by the Patrons, Ordinaries and Incumbents, without the Licence precedent of the King, or his subsequent Assent : Yet there cannot be any appropriation made of any Church or Advowson, without the Kings special Licence first obtained. For that every appropriation is a Mortmain, and the Patronage of the Advowson is thereby lost and extinguished, and the person or Corporation to whom the appropriation is made, is become Parson impersonec.

Concerning appropriations of Churches

Churches or Advowsons : 1. Concerning the time when that appropriations first begun, it is very uncertain : yet I find in *Dector Riddleys* Book of the View of the Civil Law, that the beginning of appropriations and discharge of Tythes, was after *Benedict* the Monk who was the first Institutor of the Order of Monks; and *vid. Cook* 12. part, where it is said, That the Saxon Kings appropriated eight Churches to the Monastery of *Crowland*, as appeareth also by *Ingulphus* who was Abbot there; and it will be a difficult thing at this day to find out when appropriations were first made.

The Abbot of *Sulby* held the Parsonage of *Lubbenham* in the County of *L.* to his own use, which as a Parsonage Improprate came to King *Henry* the eighth by the Statute of 31 H. 8. of Dissolutions. The King Anno 37. of his Reign granted it in Fee-farm, under which grant the plaintiff claimed: the defendant obtained a Presentation from the Queen, and to destroy the appropriation, did shew the Original of it, with a condition, that a Vicarige should

Tr. 37. Eliz. in
Ex. Chamber,
Crimes and
Smiths Case,
Cook 12. p. 4.

should be perpetually endowed, which was in 22 E. 4. and alledged that there never was a Vicarige endowed; and therefore that the appropriation was void: But it was Resolved by the whole Court, that the Vicarige in respect of the long continuance thereof was endowed, and in this case it was further said, that it should be dangerous now to examine the original of appropriations of Parsonages, and endowment of Vicariges, for that the Originals of them in time will perish.

But now further concerning appropriations of Churches and Advowson, Observe these Rules and grounds of Law, and the cases proving the same; and 1. It is to be noted and observed, that no man can make any appropriation of any Church having Cure of souls, the same being a thing Ecclesiastical, and to be made to some Ecclesiastical person, or body politick, but he only that hath Ecclesiastical Jurisdiction: and therefore in all appropriations, the Instrument of the appropriation is by the Bishop or Ordinary, and runs in this, or the like form,

form, viz. *authoritate nostra Ordinaria Ecclesiam Parochialem de B. &c. Priori, & Conventui, &c. annuimus, appropriamus, & unimus per presentes:*

Cook 9. par. in
Cavdries case

But yet the King is such a Spiritual person, that he of himself may appropriate any Church or Advowson, because he hath the Ecclesiastical Jurisdiction and power in him. But no other person within the Realm, or without, but the King, or the Ordinary by Authority derived from the King, can make any appropriation; and therefore appropriations made by the Pope, or by Licence from and under the Pope, were never allowed of by our Law. 2. Every appropriation must be with the Licence of the King: otherwise it is not good: and the Licence must be to the Spiritual body, or person to whom the appropriation is to be made to take the same, and not to the Bishop to make the same.

An Advowson of a Prebend holden of the King was aliened to an Abbot and his Successors: and afterwards the King granted unto the Abbot and his Successors, That the Abbot and his Successors should hold

hold the Prebend in their own hands : yet because the first alienation was without Licence, the King did seize the Prebend notwithstanding his subsequent Grant : and that the same must be to the Spiritual Body, or person, appeareth by *Pridle* and *Nappers* case. *Cook* 11. p. 9. Where, upon the special verdict, it was found, that the King by his Letters Patents *Licentiam dedit Priori & Conventui, &c. Quod ipsi Ecclesiam Parochialem de B. appropriare, consolidare, & incorporare, &c. & eam sic appropriatam, consolidatam & incorporatam in proprias manus & usus retinere possint.*

3. The Licence to appropriate, is alwayes general, *Quod cedente, vel decedente Rectore, &c.* And therefore an appropriation made when the Church is full of an Incumbent, *viz.* as to say (that the Parson to whom the appropriation is to be after the Church shall become void, shall be Parson, and shall retain the Gleab and fruits thereof to his own use) or else when the same is void of an Incumbent. In 8. Eliz. *Dyer* 244. an appropriation was made by the King of a Parsonage to the Bishop
of

of *Coventry* and *Lichfield*, when the Church was full of an Incumbent, and it was adjudged it was good, and that the Bishop had nothing in the Parsonage during the life of the Incumbent; and therefore a Lease made thereof by him to begin after such a time as the Parsonage should come to him or his Successors, was adjudged void. 4. Upon the appropriation of every Church, there must be a Vicar endowed, and a competent sum of money appointed yearly to be distributed to the poor.

In 18 H. 6. 21. in the Great case of Consultation which was argued in the Exchequer Chamber, it was the opinion of the then Master of the Rolls, that an Advowson could not be appropriate without a succession, although the Incumbent purchase the Advowson by Licence to hold to his own use; For if a Prior be seized of an Advowson to him and his heirs, and he purchase Licence of appropriation, and he and his Successors shall hold the Advowson to their own use; yet the Advowson shall descend to his heirs; but

Coo 5. p. 110.
Coo 11. 11.
Coo 500.

Tr. 9: Car. in
B.R. Alden
and Tolsels
Case.

but in such case if he will have the appropriation good, it were best for to alien the Advowson, and to repurchase it to him and his successors, and then the appropriation will be good. Lastly, all appropriations have been usually to Corporations or persons spiritual, and not to bodies politick consisting of meer Lay-men; But whether the same may be at this day to Lay-men or to Lay-Corporations, I will not take upon me to resolve: For it was lately a question depending in the Kings Bench: and (as I take it) not yet resolved, Whether the King since the Statute of 25 H. 8. may by his Letters Patents, appropriate a Church Parochial, which was before Presentative, to a Lay-Corporation, all the Members of the Corporation being but meer Lay-men.

And thus much also briefly concerning Churches Parochial and Collegial, Presentative and Donative; and of the Union, Consolidation, and Appropriations of them, and Advowsons.

CHAP.

CHAP. XXIX.

Of the Power of the Ordinary, And of his Certificate of Loyalty, of Matrimony, Bastardy, Profession and Excommunication.

THE Power of the Ordinary is very great, both in the Judging and determining of Ecclesiastical matters and Causes, of which he hath Jurisdiction; as also in the Execution of some things incident to his Office or place of Ordination.

Now the general Causes Ecclesiastical, of which Ordinaries have Jurisdiction, are these, *viz.* Blasphemy, Apostacy from Christianity, Heresies, Schisms, Ordaining of Ministers, Institution of Clerks presented to Benefices, Celebration of Divine Service, The Causes of Loyalty, of Matrimony, Divorces, general Bastardy, the Right of Tythes, and of Subtractions of them: Oblations,

Y Ob-

Obventions, Dilapidations; Causes concerning the Reparation of Churches; Probate of Wills and Testiments, Administrations, and Acccompts for the same. The Causes of Incests, Fornications, Adulteries, Solicitation of Chastity, Pensions, Appeals in Cases Ecclesiastical; the Conusans of all which Causes do properly belong to Ordinaries, to be heard and determined in their Ecclesiastical Courts: But of this general power of the Ordinary, there are many restrictions, as by several Cases after mentioned it will appear. And therefore, 1. Although the Ordinary may grant Administration of the goods of a person who dyeth Intestate: yet he cannot dispose of the Intestate goods before all the Debts of the Intestate be fully satisfied: And therefore the Case in 7. Eliz. in Dyer 252. was, an Action of Debt was brought against the Ordinary for the debt of the Intestate; It was the opinion of the Justices, that after notice given of the Debt unto the Ordinary,

ry, That the Ordinary cannot dispose of the goods of the Intestate, until he hath satisfied the debt for which the Action is brought against him.

2. If Administration be committed of the Intestates goods to one by force of the Statute of 21. H. 8. and the Administrator doth satisfy and pay all the Intestates Debts, and his Legacies; yet the Ordinary hath not power to dispose of the rest and residue of the Intestates goods, either to the children of the Intestate, or others; but that they shall remain to the Administrator within the Intention of the Statute of 21. H. 8. as it was adjudged in one *Barrows* case: which see *Pale. 19. Jac. in Co. B. in Hobarts Reports.*

The Commissary of the Bishop of *London* granted Administration of ones goods who dyed Intestate by Word; The Administrator sold the goods and dyed: Administration *de Novo* was granted to another who sued for those goods; and the

Issue was, *Si Episcopus London commisit Administrationem*. It was doubted at the first, if the Administration granted by the Ordinary by word only was good or not; It was at last Resolved, that it was not good: *vid.* to that purpose, Mic. 13. Eliz. Dyer 294. 21. E. 4. 10. and Cook 9. part 41. in *Hensloes* case.

3. If the Ordinary doth demand of a Clark who is presented unto him to be Instituted into a Benefice with Cure, his Letters of Orders, or his Letters of Testimonial of his good behaviour, and the Clark doth not shew them unto him, but departeth: and thereupon afterwards the Ordinary doth refuse him, and presents another to the Church; in this case it is a Disturbance of the Ordinary, and a *Quare Impedit* will lye against him upon such a Disturbance; and the reason is, because the Statute doth not compell the Clark who is presented to him, either upon his Examination, or at any other time, to shew
to

to the Ordinary his Letters of Ordination, or his Letters of Testimonial of his good behaviour, as it was adjudged, Pasc. 33. Eliz. in Co. B. in *Palmer* and the Bishop of *Peterborow*s case.

I said before, That of those things or Causes which are meer Ecclesiastical, the Jurisdiction thereof belongeth unto the Ordinary, and he shall be the Judge thereof, and his Certificate as Judge shall bind the parties in the Kings Temporal Courts; And therefore if in Writs of Dower and other Writs brought in the Kings Temporal Courts, Issue be joyned upon *Ne unque accouple in Loyal Matrimony*, this being a Cause which is meer Ecclesiastical, the tryal thereof must be by the Bishop or Ordinary, upon an Inquisition taken before him as Judge; which is after this manner, *viz.* The King first sends his Writ to the Bishop to make the Inquiry; For the Ecclesiastical Judge before he hath received the Kings Writ, may not of himself enquire of the

Loyaltie of the Matrimony: But after such time as he hath received the Writ to make the Enquiry, he must not surcease for any Appeal or Inhibition, but must proceed untill he hath certified the Kings Courts thereof; and then when the Bishop hath received the Kings Writ, he doth give Notice thereof unto the party who took exception to the matrimony, at his dwelling house, if he hath any within the Diocess, to speak at a day prefixed by him against the Matrimony if he will, and after such notice given, whether the party come or not, the Witnesses of the Demandant to prove the Loyalty of the Matrimony, are taken, and admitted by the Bishop, if no sufficient Exception be taken to the Witnesses. After the Depositions taken they are published, and certified into the Kings Court where the Issue was joyned, by Letters under the Seal of the Bishop, the form of which Certificate you shall find to be after this manner, viz.

Breve

Breve Domini Regis presentibus annexum omni qua decuit reverentia accepimus ; virtute cujus Brevis , vobis certificamus , Quod omnibus & singulis in Brevis illo specificat. rite & debite juxta juris Ecclesiastici exigentiam observat. et vocatis ex ea parte vocandis diligentem & celerem fieri fecimus Inquisitionem de rei veritate de & super materiis in brevi content. Per quam luculenter & evidenter compertimus & invenimus per legitimas Probationes , & alia in hac parte Canonice requisit. quod A. in brevi predict. Nominat. apud B. in Com. N. in Diocesi N. D. in predicto brevi similiter Nominato legitimo Matrimonio Copulata fuit. In cujus rei, &c.

By this Certificate it appeareth, that the Ordinary must certify the point in issue generally, viz. That Copulata, vel non Copulata fuit in legitimo Matrimonio, and must not make a special verdict of it, or express the manner of the Marriage at large. And after such Certificate made, there shall be no Ap-

14 Eliz. Dyer
303. 313.

peal, but the same Certificate shall be a Barr, and conclude all parties for ever: and after such Certificate and Resummons of the Tenant in the Kings Temporal Court, Judgment shall be given for the plaintiff.

10 R. 2. Tryall
F. 10.

If a Writ of Dower be brought against the Bishop of N. and others by several *Præcipes*, and they plead that the Demandant *Ne unque fuit accouple en loyall Matrimony*: yet shall the Writ go to the same Bishop to certifie the Loyalty of Matrimony, and not unto the Metropolitan; For although the Bishop be a party to the Writ, and Defendant in the cause; yet because there are other parties and defendants besides himself who shall be bounden by his Certificate, it shall be presumed that the Bishop will do right; and therefore he himself shall be Judge of the Matrimony: But if the Bishop himself alone had been Defendant, and had pleaded such a plea to Issue, there he shall not try the Matrimony; for then

then he should be Judge in his own cause, which the Law will not suffer; and therefore the certificate shall be by the Metropolitan: But if in a Writ of Dower or other Writ, the Issue to be tryed be, Whether *Alice* the demandant was the Wife of *I. S.* or not, the same shall not be tryed by the certificate of the Bishop, but by a Jury at the Common Law.

Bastardy is an Ecclesiastical Cause; and if generall Bastardy be pleaded in disability of the plaintiff, the same shall be tryed by the certificate of the Bishop, whether it be in a real or a personal action: But if it be pleaded, that the plaintiff was born at such a place before the Marriage was solemnized, *Et si sint Bastard*, this a special Bastardy, and shall be tryed by a Jury at the Common Law, where the birth is alledged.

Profession is another Spiritual thing, and tryable by the certificate of the Bishop: For so was Profession alledged in a Knight of the

Cook 8. part.
the Abbot of
Strat. Mercel-
lus Case.

4 E. 4. 15.

38 E. 3. Lib.

Aff. 24.

41 E. 3. 11.

1 H. 6. 3. acc.

40 E. 3. 27.
by Belknap.

Or;

31.E.3. Tryal
98.
2.R.3.4. contr. Order of St. Johns of Jerusalem in England, tryed by the certificate of the Bishop where the Profession was alledged.

In 9 H. 7. 2. by *Huffey*, If a man plead Profession in another man, which is traversed, it shall be tryed by the Certificate of the Ordinary: But if he plead, that at the time of the making of such a Deed, or the doing of such a thing, that the party was professed in some Order of Religion, the same shall be tryed by a Jury at the Common Law, because the Profession refers to a certain time: But if Profession or Bastardy, be alledged in a stranger who is no party to the Writ or Action brought, there the Profession, or Bastardy shall be tryed by a Jury at Law: For that if the tryal should be by the Ordinary, and he make his certificate of the same, the same remains a Record for ever, and the same should conclude and bind the party for ever: for that he cannot averr against it; which would be dangerous and prejudicial to him who

43.E. 3. 37.6.
33 E.3. Tryall
99.

who is a stranger to the Writ.

Admission and Institution are also Spiritual things, and shall be tryed by the certificate of the Bishop; For Institution is but the Letter of the Bishop, of which a Jury cannot take notice. But Induction is a Temporal thing, and shall be tryed by a Jury at the Common Law.

Excommunication is another Spiritual thing, and if it be pleaded in disability of the party in the Temporal Court, the same must be certified thither by the Bishop himself: For no man can certify an Excommengement but only the Bishop who is the immediate Officer to the Kings Temporal Court to that purpose: But if the Bishop be *in remotione*, or (*sede vacante*) an Excommengement certified by the Guardian of the Spiritualities is sufficient. An Excommengement certified by the Commissary or Official of the Bishop is not good at this day, although in antient times the same hath been allowed.

If

Cook 1. part
lohit. 134.

41. E. 3. 10.

12. E. 4. 15.

20. H. 6. 17.

20. E. 3. Ex-
commeng. 20.

20. H. 6. 1.
8. H. 6. 3. acc.

11. H. 4. 64. in
Debt.

7. E. 4. 14. acc.

16. E. 3. Ex-
commeng. 4.

10. E. 3. Ex-
commeng. 29.

Dr. & Stud.
127. acc.

12. E. 3. Ex-
commeng. 29.

If the Pope, or any other having Forreign Authority do excommu-
nicate any subject of the Realm of
England, or the Dominions thereof,
the same is no disability of his person;
For that the Common Law disallows
of all Acts done by Forreign power in
the disability of any subject within
this Realm.

16. E. 3. Ex-
commeng. 29.

10. E. 3. Ex-
commeng. 29.

9. H. 7. 21.
7. E. 4. 14.
Cook. 8. p. 10.
Trotkops Case.

If a Bishop certifieth the Kings
Temporal Courts, that another Bi-
shop certified him that the party is
Excommunicated in his Diocess,
this certificate upon the certificate,
or Report of another is not good
nor allowed of in our Law: For the
Bishop must certifie the party to be
excommenge upon his own know-
ledge. But if a man be Excommu-
nicate by the Commissary of the
Bishop or his Official, the same be-
ing done in the Bishops right, and
in his Court, is sufficient, although
the same be not certified into the
Kings Courts under the Seal of the
Bishop.

If a Bishop be a defendant in an
Action brought against him, an
Ex-

Excommungement of the plaintiff in that Action certified by him to have been in his own Court, is not allowed of to be pleaded in disability of the plaintiff: for that the Bishop shall not be a Judge in his own cause, and the Kings Temporal Courts shall intend the same to be in the same cause.

5. E. 3. 8.
16. E. 3. Ex-
commung. 104
9. H. 7. 214

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AN
APPENDIX,
CONTAINING
The HEADS of all the
several Statutes made in the Reigns
of King *Charles* the First, and King
Charles the Second, relating to the
Matters contained in the former
Book, and other Things touching the
same POINTS.

IN the Statute made 13 Car. 2.
cap. 12. is an Explanation of a
Clause contained in the Act of
17 Car. 1. cap. 11. touching the
Repeal of a Branch of the Statute
made 1 Eliz. cap. 2. viz. *It is declared,
That neither the said Act, nor any
thing therein contained, doth take away
any ordinary Power or Authority from
the Archbishops, Bishops, or persons there-*

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in named; but that they may use all Ecclesiastical Jurisdiction as formerly in causes belonging to the same. With Provifo, That they may not tender or administer to any person whatsoever the Oath Ex Officio, or any other Oath, whereby such persons to whom the same is administered, may be charged or compelled to confefs or accuse, or purge him or her self of any Criminal matter or thing whereby he or she may be liable to Censure or Punishment.

Agreeable to this was a Resolution by the whole Court in the Common-Pleas, in the Case of *Allan Ball*, where the Question was, How far the High Commissioners might extend their Authority? And it was resolved, They might not send a Pursuivant to arrest any person subject to their Jurisdiction, to answer any matter before them: But they ought to proceed according to Ecclesiastical Law by Citation. Which they may send by a Pursuivant, and upon default proceed to Excommunication, and then to have a *Capias Excommunicatum*; which Writ *de Excommunicato Capiendo* is preserved, and returnable by

G. N.

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the Statute of 5 Eliz. Sec. 1. *tit. Accusation.*

By the Statute made 16, 17 Car. 1. 11. The Branch of the Statute of 1 Eliz. 1. which gave power by Commission under the Great Seal to exercise Ecclesiastical Jurisdiction is Repealed, with addition, That no Ecclesiastical Judge, Officer or Minister of Justice shall award, impose or inflict any Pain, Penalty, Fine, Amercement, Imprisonment or other corporal punishment upon any of the Kings Subjects, for any contempt, offence, matter or thing whatsoever, nor give any Oath to any Church-Warden, Side-man or other person, to present or confess any thing, or to accuse him or her self of any crime or offence, whereby they may be liable to any pain or punishment, in pain to forfeit treble damages to the party grieved, and 100 l. to the first prosecutor, to be recovered by Action of debt, &c. in which no Wager of Law, &c. shall be allowed. And further, No new Court which may have the like power that the High-Commission pretended to have, shall be hereafter created, but all such Jurisdictions, and all

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Acts, Sentences and Decrees made by colour thereof shall be utterly void and of none effect.

Simony is a Sufficient cause for Deprivation, and so it was adjudged in Doctor *Hutchinsons* case, Parson of *Keyne* in Devonshire, that if any shall receive or take money, fee, reward or other profit for any presentation to a Benefice with Cure, although in truth he which is presented be not knowing, yet the Presentation, Admission and Induction are void by express words of the Statute, 31 H. 8. cap. 6. And the King shall have the Presentation *hac vice*. But if the Presentee be not cognizant of the Corruption, then he shall not be within the clause of Disability in the same Statute. And this was resolved by all the Justices in Fleetstreet, Mich: 8. Jac.

A Parson grants an Annuity with a *Nomine pœne*, the Successor shall be charged with the *Nomine pœne* due in his Predecessors life, and not his Executors.

And if I.S. be Parson of D. and land be given to I.S. Parson and his Successors, and to I.S. Clerk and his heirs, he

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he is a Tenant in Common with himself.

The Parson in regard of his continuall attendance upon that Sacred Function, is freed from all personall charges that may hinder him in his calling; for such a one shall not be chosen Bayliff, Beadle, Reeve or other such Officer, F. N. B. 175. nor be compelled to come to the Sheriffs Turn. *Marl. c. 10.* Nor to the Leetes of the King or other Lords for Lands annexed to their Churches. F. N. B. 160, c.

To the Parson belongeth of common right (as our Books say) the tenth of all manner of yearly encrease, which we call Dismes or Tythes, and therefore by a Lease of *Rectoria*, the Lessee shall have the Tythes and offerings of the same Church, for they are incident unto it. 15. *H. 7. 8.*

And if a Parson demise his Glebe to a Lay-man, he shall pay tythes, because they are of common right. 32 *H. 8. Br. Dism. 17.*

Every Parson before he can be incumbent, must be presented to the Ordinary who is to admit him, and there-

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fore is allowed time to inquire of the Clerks ability : As if he be presented to the Bishop when he is ready to ride, who willet him to come to him in three dayes to be examined, but if he come not then, nor within six moneths after, the Bishop may collate by Lapse: for there be many things to disable him from having the Benefice ; As if he be criminous, insufficient or have not his Letters of Order, &c. And if a meer Layman be presented, admitted and instituted, and no sentence of deprivation or nullity given, the Ordinary cannot collate by Lapse, for till that time the Church is full to all intents.

When the Ordinary admitteth him to be able, that is called Admission; when he admitteth him to the charge, as to say to the Clerk, *Instituto te habere curam animarum*, that is Institution.

And then the Archdeacon is to put him in possession, by delivering the Ring of the Church door unto him, and ringing of Bells, which is called an Induction; and that being done, the party becometh an Incumbent : Be-
fore

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fore which Induction, there is no Possession or Freehold in him of Glebe, house or Tythes: so as a rent granted by a Prebendary after Admission and Institution, and before induction, with confirmation of the Ordinary before Induction, and of Dean and Chapter, the day of Induction is void.

The Incumbent hath not the meere right in him of Land in the right of his Church: But the Fee-Simple is in abeyance, that is only in the remembrance, intendment and consideration of Law; therefore he cannot discontinue, and every act which he doth with such land may be avoided, when he ceaseth to be Incumbent, except such as are done by consent of Patron and Ordinary, which bind for ever, *Lit.* 143. 12 H. 8. 7.

If the Church be void six moneths without presenting, which is called, a Lapse, the Ordinary himself may collate, that is, appoint a clerk of his own; and if it be void six moneths after his time, then the Metropolitan; and six
Z 4 moneths

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moneths after his time the King may present : but all this is to be understood, If the Patron present not before them : But so long as the Church is void though it be two years after, the Patron may present, and the Ordinary or Metropolitan are bound to admit him. *Doct. and Stud. per Br. plen. 15.*

When one Church is not able to find the Cure, the Ordinary by consent of the Patrons may unite it, or make a consolidation of it to some other : And it seems that in this case, the consent of the King is not required, because here is no prejudice wrought to any; for if one man be Patron of both Churches, he shall have the Sole presentment : if there be severall Patrons, then they shall present by turn, and the King shall have the Lapse as before he should : Otherwise it is upon an appropriation, for that is an Amortisement, and therefore all must joyn in the making of it.

Observe, That *Annates, Primitie* and First-Fruits are all one, and were the value of every Spiritual Living

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Living by the year, which the Pope claiming the disposition of all Ecclesiastical Livings, reserved to himself. And those and Impropriations began about the time that *Polydore Virgil*, Lib. 8. cap. 2. saith. *Vide Concilium Viennense, quod Clemens quintus indixit pro Annatibus.* These First-Fruits were given to the Crown by the Statute of 26 H. 8. cap. 3.

Decima, That is, Tenths of Spiritualties were perpetual, and paid to the Pope till *Urban* gave them to *Richard* the Second, to ayd him against *Charles* King of *France* and others, who supported *Clement* the 7th against him.

Hill. 34 E. 1. Anno 1307. At a Parliament holden at *Carlisle*, great Complaint was made of Oppressions of Churches, in which Parliament, the King with the assent of his Barons levied payment of First-Fruits, and writ to the Pope to that purpose; whereupon the Pope relinquished his demands, and the First-Fruits for two years were by that Parliament given to the King.

In

In the 17th year of King *Charles the Second*, cap. 3. at *Oxford*, was made an Act for Uniting Churches and Chappels in Towns Corporate; which see: whereby it is declared, That it shall be lawful for the Bishop of the Diocess, Mayor, Bayliff, &c. of any City or Corporate Town, and the Patron or Patrons to unite two Churches or Chappels in any such City, Town, or the Liberties thereof; Provided such Union shall not be good, if the Churches so united exceed the sum of one hundred pounds *per annum*, unless the Parishioners desire otherwise, &c.

Usurpation is when the Church becomes full by the presentment of a wrong Patron, which is done by the Institution of the party presented; But against the King Induction onely doth it. Therefore at the Common Law in a *Quare Impedit*, Plenarty at the day of the Writ purchased is a good plea, though it be by Institution onely. And the Plenarty by six moneths (which barreth the right Patron

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Patron of his *Quare Impedit* by the Statute of *Westm. 2. cap. 5.*) is accounted from that time between common persons. So is it for the King when he presenteth. And in these Cases the Ordinary may certifie a Plenarty without making mention of any Induction, but of Admission and Institution onely; But against the King, Plenarty is accounted from the time of Induction, and not before. And if a Patron that holdeth of the King, present, and dye after admission and institution of his Clerk, and before Induction, the King shall present anew. Otherwise it is in the case of a common person. But Plenarty is no plea in a *Quare Impedit* against a person impersonnee, (that is, a Spiritual Body Politique, which being Patron, hath the Church appropriated in succession, *viz.* to hold to their proper use without presentation, institution, or induction of any Incumbent) for his Plea must be, That the Church is full of his presentment, which a person Impersonnee cannot say. Nor is Plenarty in a *Quare Impedit* or *Barrein*

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rein Presentment, if the Writ be purchased within six moneths.

It hath been held, That for subtraction of Tythes, where the treble value is forfeited, it must be sued for at the Common Law; And so it was accordingly adjudged, Trin. 44 Eliz. in *Spratt and Heales Case*, which was thus, *Spratt* Libelled in the Spiritual Court against *Heale* for subtraction of Tythes; The Defendant in the Spiritual Court averred, That he had divided the Tythes from the Nine parts: Then the Plaintiff made addition to the Libell (in nature of a Replication) That the Defendant divided the Tythes from the Nine parts *prorsus diffitetur*; adding, That presently after the pretended division, *in fraudem Legis*, he took and carried away the Tythes, and converted them to his own use: and thereupon the Plaintiff obtained Sentence in the Spiritual Court, and to recover the treble value according to the Statute, 2 E. 6. cap. 13. And thereupon *Heale* made a Surmise, That he had divided

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divided his Tythes, and that the Plaintiff ought to sue in the Spiritual Court for the double, and at the Common Law for the treble value. But it was resolved by the whole Court, That the said Division mentioned in the Libell, was not any division within the said Statute of 2 E. 6. cap. 13. Secondly, it was resolved, That the Plaintiff could not sue in the Spiritual Court for the treble value, but for the double value he might.

The Act of 14 Car. 2. cap. 4. That settles the Liturgy of the Church of *England* as it now stands reformed, makes several new causes of deprivation.

As first, That every Parson, Vicar, or other Minister in possession of an Ecclesiastical Benefice, is enjoined to read the said Common Prayer, and afterwards to make the Declaration in the said Act mentioned, upon penalty, there being no lawful impediment; and within one moneth after such impediment removed, of being deprived *ipso facto*, as if the person neglecting

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neglecting or refusing so to do were dead.

2. All Parsons, Vicars and Ministers to be after presented or put into any Ecclesiastical Benefice, enjoined to read the Common Prayer as aforesaid, and to make the aforesaid Declaration within two moneths after they shall be in actual possession upon the same penalty.

3. All Deans, Canons, Prebendaries, Masters, Fellowes of Colledges, &c. Parsons, Vicars, Lecturers, Schoo.-Masters, &c. enjoined to take and subscribe another Declaration in the said Act mentioned, upon pain of Forfeiture and loss of their places as if dead.

4. Every Parson, Vicar, Curate and Lecturer after subscription made, shall procure a Certificate under the Hand and Seal of the Archbishop, Bishop or Ordinary of the Diocess, and publickly read the same, together with the said Declaration upon some Lords Day within three moneths then next following, in his Parish Church
where

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where he is to officiate in the presence of the Congregation there assembled, in the time of Divine Service, upon pain of being *ipso facto*, and his place void as if dead.

5. Provided, That no Title of Lapse shall accrue by any avoidance or deprivation by this Act, but after six moneths after notice given by the Ordinary to the Patron, or such Sentence of Deprivation openly read in the Parish Church becoming void by this ACT.

And whereas there were or might be some impediments to the damage of several persons by the penalties of the forementioned Act, there was another Act made, 15 Car. 2. cap. 6. Stat. 3. for relief of such persons as by sickness or other impediments were disabled from subscribing the Declaration in the said former recited Act, and Explication of part of the said former Act.

And since that, by his Majesties late Gracious Declaration, there is a

And

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kind of tacite suspension of divers of these things, and a Toleration granted; as by the same will appear. *Ideo vide.*

In the 17th year of the Reign of King Charles the First, An Act was made to take away or at least abridge Ecclesiastical Jurisdiction; And indeed through the whole current of the late Times, that Act stood in force; but this was repealed by 13 Car. 2. cap. 12. by these words, viz. *It is Declared, That neither the said Act, nor any thing therein contained, doth take away any ordinary power or authority from the Archbishops, Bishops or persons therein named, but that they may use all Ecclesiastical Jurisdiction as formerly in causes belonging to the same. Provided the said Act do not give any other Jurisdiction to Archbishops, Bishops, &c. then they had by Law before the Year 1639.*

Now what the Archbishops power was before 1639. we find reported at large by the Lord Coke in Porter and Rochesters Case, lib. 13. viz. That the Archbishop of Canterbury, is restrained

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strained by 23 H. 8. cap. 9. to cite any one out of his own Diocess; and because the Archbishop of *Canterbury* hath a peculiar Jurisdiction in *London*, for this cause it is said in the Title, Preamble and Body of the Act, That when the Archbishop sitting in his exempt peculiar in *London*, cites one dwelling in *Essex*, he cites him out of the Bishop of *Londons* Diocess. So that the intention of that Act was to reduce the Archbishop to his proper Diocess, unless in five cases.

1. For any spiritual offence or cause committed or omitted, contrary to right and Duty by the Bishop, &c. which word (*omitted*) proves there ought to be a default in the Ordinary.

2. Except it be in case of Appeal and other Lawful cause where the party shall find himself grieved by the Ordinary after the matter there first begun.

3. In case the Bishop or Ordinary
As &c.

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&c. dare not or will not convent the party to be sued before him.

4. In case the Bishop or Judge of the place within whose Jurisdiction, or before whom the Suit by this Act should be begun and prosecuted, be party either directly or indirectly to the matter or cause of the same suit.

5. In case any Bishop or other inferior Judge under him, &c. make request to the Archbishop, Bishop, or other inferior Ordinary or Judge, and that to be done in cases onely, where the Civil Law or Common Law affirm, &c.

To conclude, This Act is but a Declaratory Law of the antient Canons, and a true Exposition of them. And that appears by the Canon, *Cap. Roman. in sext. de Appellationibus et Cap. de Competenti in sext.* And the said Act was so Expounded by all the Clergy of England, Anno 12 Jac. Regis, 1603. Canon 94.

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In the last place, I will set down what Writs lye in all Cases concerning Ecclesiastical matters or things relating thereto.

And first,

Quare Impedit is a Writ that lyes for him that hath purchased a Mannor with an Advowson thereto belonging, against him that disturbs him in the right of his Advowson, by presenting a Clerk thereto when the Church is void; and it differs from the Writ called a *Darrein Presentment*, *Affisa ultima presentationis*, because that lyes where a man or his Ancestors formerly presented; and this for him that is Purchaser himself, *F. N. B. fo. 32. and Reg. Orig. fo. 30.* And here Note, That where a man may have an Affise of Darrein Presentment, he may have a *Quare Impedit*, but not *e contra*. *Vide* the New Book of Entries on this Writ.

Quare Incumbavit, is a Writ that lyes against the Bishop, who within six moneths after the Vacation of a Benefice, conterreth it upon his
A a 2 Clerk,

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Clerk, while two others are contending in Law for the right of presenting. And here Note, The Writ alwayes lyes depending the Plea, *Old N. B. fo. 30. F. N. B. fo. 48. and Reg. Orig. fo. 32.*

Quare non permittat, is a Writ that lyes for him that has right to present for a Turn against the Proprietary, *Fleta, lib. 5. cap. 6.*

Quare non admittit, is a Writ that lyes against the Bishop refusing to admit his Clerk that hath recovered in a Plea of Advowson, *F. N. B. fo. 47. and New Book of Entries in the same word.*

Quod Clerici non Eligantur in Officio Ballivi, &c. is a Writ that lyes for a Clerk, which by reason of some Land he hath, is made or in doubt to be made Bayliff, Beadle, Reeve, or some such like Officer, *F. N. B. fo. 175. and Reg. Orig. fo. 187.*

Quod Clerici Beneficiati de Cancel. is a Writ to exempt a Clerk from contribution

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tribution towards the Proctors of the
Clergy in Parliament. *Reg. Orig. fol.*
261.

Quod nec Persona nec Prebendarii,
&c. is a Writ that lyes for Spiritu-
al persons that are distrained in
their spiritual possessions for the pay-
ment of a Fifteenth with the tenth of
the Parish. *Vide F.N.B. fol. 176.*

Juris Utrum, is a Writ that lyes
for the Incumbent, whose Predeces-
sor hath aliened his Lands or Tene-
ments, the divers uses of which, see
in *F.N.B. fol. 48.*

Excommunicato capiendo, is a Writ
directed to the Sheriff for the appre-
hension of him who standeth obstinate-
ly Excommunicated forty dayes; for
such a one not seeking Absolution,
hath or may have his Contempt cer-
tified into the Chancery, whence
issueth this Writ, for the imprisoning
him without Bail or Mainprise, untill
he conform himself. *F.N.B. fol. 62.º*

Excommunicato Deliberando, is a
Writ to the Under-Sheriff, for the
delivery

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delivery of an Excommunicate person out of Prison, upon Certificate of the Ordinary of his Conformity to the Jurisdiction Ecclesiastical. *F.N.B. fol. 63.*

Excommunicato Recipiendo, is a Writ whereby persons Excommunicate being for their obstinacy committed to Prison, and unlawfully delivered thence before they have given Caution to obey the authority of the Church, are commanded to be sought and laid again into Prison. *Reg. Orig. fo. 67.*

There are some other Writs which might be here inserted; but we suppose this sufficient for this place.

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